(6)

No. 04-5462

Supreme Court, U.S.
FILED
OCT 26 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX
VOLUME III, PAGES 456 TO 652

BILLY H. NOLAS*
DAVID W. WYCOFF
MICHAEL WISEMAN
Assistant Federal Defenders
MAUREEN KEARNEY ROWLEY
Chief Federal Defender
DEFENDER ASSOCIATION OF PHILADELPHIA
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520
(215) 928-0826 Fax
Counsel for Petitioner

GERALD J. PAPPERT
Attorney General
Commonwealth of Pennsylvania
RICHARD A. SHEETZ, JR.
Executive Deputy Attorney General
Director, Criminal Law Division
AMY ZAPP*
Chief Deputy Attorney General
Appeals and Legal Services Section
OFFICE OF ATTORNEY GENERAL
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 705-4487
(717) 783-5431 Fax
Counsel for Respondent

**Counsel of Record*

Petition For Certiorari Filed July 23, 2004
Certiorari Granted September 28, 2004

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COURT OF COMMON PLEAS OF LEHIGH COUNTY
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	No. 88-682
vs	:	
RONALD ROMPILLA, Defendant	:	

NOTES OF TESTIMONY

BEFORE THE
HONORABLE THOMAS A. WALLITSCH, J.
Thursday, March 28, 1996
9:00 a.m.
Courtroom No. 5C
Lehigh County Courthouse
Allentown, Pennsylvania

APPEARANCES:

JACQUELINE PARADIS, ESQUIRE
For the Commonwealth

MICHAEL WISEMAN, ESQUIRE
and
BILLY H. NOLAS, ESQUIRE
For the Defendant

COURT REPORTER:

MOIRA E. EVANS, RPR

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[4] (Whereupon, the proceedings begin.)

THE COURT: All right.

MR. WISEMAN: Good morning, Your Honor.

THE COURT: Morning. All right. We had a motion to quash a subpoena which was filed, and yesterday we argued that matter on the record. I'm going to permit the introduction of those two reports, which is what was sought, rather than compel any personal attendance. That's what was requested. I'll permit that. And they were the two I think Exhibits E and F in the petition, yes? Am I correct on that?

MR. WISEMAN: That's right, Your Honor.

THE COURT: Very good. All right. All right then, ready to proceed?

MR. WISEMAN: Just one clarification. Are the reports being offered for both the facts and opinions contained in them?

THE COURT: Yes.

MS. PARADIS: To the extent there are any opinions in there. There's not a lot in there. But I hadn't

had the benefit of looking at it at that time. And now – excuse me, Your Honor.

THE COURT: Have you seen it, Ms, [5] Paradis?

MS. PARADIS: What?

THE COURT: The two –

MS. PARADIS: The reports?

THE COURT: From Dr. Irwin.

MS. PARADIS: Yes, I have, Your Honor, and I don't know what Mr. Reichley discussed with you yesterday, however, if the Court is going to consider these without testimony or without any kind of cross-examination of this doctor, I would certainly like to point out that it appears that these two documents were prepared based on interviews with the defendant.

I would argue that they were self-serving, that these opinions were improper, things of that nature. But I'm sure Mr. McIntyre will do that at the appropriate time when he is making the argument in the case in toto.

THE COURT: I don't think Mr. Reichley had the benefit of seeing those at the time.

MS. PARADIS: Okay.

THE COURT: All right. Very good. All right then, ready to proceed?

MR. WISEMAN: We are ready to [6] proceed, Your Honor. We have three witnesses subpoenaed. All three are attorneys. I'm prepared to call the first one, Ms. Dantos. I imagine the other two would like to be excused. That's fine with us subject to being on call –

THE COURT: That's fine.

MR. WISEMAN: – later in the morning or afternoon.

THE COURT: With regard to timing on that you'd like to call Ms. Dantos first?

MR. WISEMAN: That's right.

THE COURT: And then I don't know how long you anticipate if you have other witnesses that you can set the other lawyers for later on?

MR. WISEMAN: I can tell Your Honor my intention. I'd like to start with Ms. Dantos, then go to Mr. Nelthropp and then finish up, if we get to him today, with Mr. Charles.

THE COURT: All right. You want to do all of the attorneys before you do anything else, is that what you're saying?

MR. WISEMAN: Yes, Your Honor.

THE COURT: Well, then why don't we have Ms. Dantos and have Mr. Nelthropp be excused to 10:30 and Mr. Charles until 11:30.

[7] MR. WISEMAN: That's fine with me.

THE COURT: All right. Fine. Thank you.

MR. WISEMAN: Your Honor, can I ask to have all witnesses, fact witnesses, sequestered please from the courtroom.

THE COURT: What fact witnesses?

MR. WISEMAN: I don't know if there are any of the fact witnesses in the courtroom, but I would ask that if the Commonwealth has any, that they be excused.

THE COURT: Ms. Paradis?

MS. PARADIS: Your Honor, I have no fact witnesses.

THE COURT: All right. Fine.

MS. PARADIS: Your Honor, I would like to make an inquiry before we begin. Attached to the petition is an Exhibit Number G or Letter G, excuse me, it's called initial transfer petition. I would just like to make inquiry of the Court whether that is, in fact, part of the court file?

THE COURT: Is it part of the court file? It is part of the petition.

MS. PARADIS: It's part of the petition, but is it part of the Court file which you [8] would have kept separately?

THE COURT: I don't know. I don't have the Court file here.

MS. PARADIS: You don't have the Court file?

THE COURT: We can check that out, however, Ms. Paradis.

MR. WISEMAN: Your Honor, I could shed some light on it. I personally retrieved that from the Court file in regard to Mr. Rompilla's prior conviction.

THE COURT: So it is.

MR. WISEMAN: It was on microfilm.

MS. PARADIS: Which court file?

MR. WISEMAN: The old court file, the court file from Mr. Rompilla's prior conviction from –

MS. PARADIS: 1978.

MR. WISEMAN: 1974 I believe.

MS. PARADIS: Okay. There's a reference to 1978.

MR. WISEMAN: Well, just so the record is clear.

MS. PARADIS: From the Lehigh County Court of Common Pleas.

[9] MR. WISEMAN: Yes. The indictment on the document it has a box that says indictment, term of court CCP-148714E1460074. I take it that's the docket number of the prior conviction.

MS. PARADIS: Thank you.

THE COURT: All right then, you may proceed.

MR. WISEMAN: Yes, I think Mr. Charles is waiting for some instruction from the Court.

THE COURT: Mr. Charles, what is intended is to have Ms. Dantos testify first then Mr. Nelthropp. So I've said you can be excused until say 11:30 and maybe what we can do when we see how far we get at the break we can call you. Ms. Dantos perhaps can call you.

MR. CHARLES: Am I sequestered by any chance?

MR. WISEMAN: Yes, I made that.

THE COURT: He had made that request that that be done, and I'll permit that.

MR. CHARLES: I have documents that I'm going to provide to Mr. Wiseman. Would it be fine to just leave this and go or –

THE COURT: Fine. That will be [10] fine.

MR. WISEMAN: Ms. Dantos, please.

MS. PARADIS: I hate to keep interrupting. I apologize, Your Honor, but it has come to my attention through counsel yesterday, they have materials in their possession that they would consider either work product or confidential information which I was not allowed to interview them about.

And I would like to know at this time whether Mr. Rompilla or his counsel on his behalf would be willing to waive the privilege, because they certainly are germane to the issues we're exploring today.

MR. WISEMAN: Your Honor, I addressed this with Mr. McIntyre in regard to some prior documents that I had provided him at that time. Mr. McIntyre agreed to a condition to my voluntary release of those documents.

The condition was that certainly they are relevant and germane to the proceedings and can be used by either side in the proceedings, but should the Commonwealth seek to use them at a subsequent proceeding, that we have not waived our right to make an objection and would have to seek a new order if one were prepared to use them. So I would [11] certainly be happy to do so.

MS. PARADIS: So for purposes of this hearing these are open?

MR. WISEMAN: Certainly.

MS. PARADIS: For waiver no confidentiality?

MR. WISEMAN: Subject to the condition I just set forth.

MS. PARADIS: Wouldn't be used in subsequent proceedings.

THE COURT: Fine. You're satisfied with that, Ms. Paradis?

MS. PARADIS: Yes.

* * *

MARIA DANTOS, ESQUIRE, having been duly sworn, was examined and testified as follows:

* * *

DIRECT EXAMINATION

BY MR. WISEMAN:

Q Good morning, Ms. Dantos.

A Good morning.

Q What's your occupation?

A I'm an attorney.

Q And by whom are you employed?

A Lehigh County District Attorney's Office.

[12] Q And for how long have you been a Lehigh County district attorney?

A Since September of 1989.

Q And when did you graduate from law school?

A May of 1985.

Q Could you briefly outline what your legal employment has been from the time you graduated until you took your job at the Lehigh County District Attorney's office?

A Sure. Right after law school and after passing the bar I was employed by the Lehigh County Office of the Public Defender as an assistant public defender. I was on a full-time basis there until I believe it was June of 1989, then I went part time and worked also part time in a private law firm, Kasick and Madey. And in September of 1990 is when I moved to the district attorney's office.

Q You know the defendant, Ronald Rompilla?

A Yes, I do.

Q How is it that you know him, you represented him?

A Yes, sir.

Q And that would be in connection with a murder in the first degree case that was prosecuted in this court?

[13] A That's correct.

Q Do you recall the time – strike that. Do you recall what the date, roughly the date of his arrest on that incident was?

A January of 1988.

Q So at that time you were a public defender, a full-time public defender?

A That's correct.

Q You had been out of law school roughly two and a half years?

A That's correct.

Q Now, were you the only public defender to represent Mr. Rompilla in this case?

A Chief public defender Frederick Charles was lead counsel in that case.

Q Now, are you familiar with how many years Mr. Charles had been an attorney at the time of this prosecution?

A No.

Q Would it be fair to say that he was somewhat more experienced than you were?

A Definitely.

Q Was he lead counsel – withdrawn.

Did you have any division of duties as far as the different phases of a capital [14] case, guilt phase and penalty phase?

A Yes, we did.

Q What was your role?

A My role was to handle the penalty phase of the trial and also to assist Attorney Charles in the guilt phase of the trial. And I did, as I recall, the majority of the client contact.

Q Did Mr. Charles play any role in the penalty phase of the trial – withdrawn,

In the – in the time leading up to the penalty phase of trial?

A Yes, he did.

Q Were you responsible for making decisions in the case in regard to the penalty phase?

A I would say not. Both of us worked on all phases of the trial. Although I conducted the penalty phase in terms of making the argument and presenting witnesses, Attorney Charles as my supervisor and as lead counsel was involved in all of the decisions and the discussions about how to proceed.

Q By the way, do you have any notes in your possession regarding your representation of Mr. Rompilla?

A No, I do not.

Q And by possession I mean either with you [15] today or at some other location?

A No, I do not.

Q Did you make any notes or memoranda in regard to the present proceedings?

A No, I did not.

Q Did you review the Post Conviction Relief Act petition filed on Mr. Rompilla's behalf?

A Yes, I've looked at it.

Q When did you look at it?

A I looked at it within the last week, and as recently as yesterday.

Q Did you make any notes or markings on that, on your copy of the petition?

A No, I did not. I don't have a copy. I reviewed the copy that's within the district attorney's possession.

Q Did you have any discussions about these – these proceedings with any member of the district attorney's staff?

A Yes.

Q Who did you talk to?

A I spoke briefly with Attorney Michael McIntyre, although he's currently tied up in a trial, so yesterday I had some discussions with Jackie Paradis.

[16] Q Did you discuss at all the substance of your testimony?

A She asked me some questions that were raised in your petition, which I answered.

Q Prior to discussion with Mr. McIntyre, recent discussion with Mr. McIntyre – with Ms. Paradis, have you ever – had you ever discussed your discussions with Mr. Rompilla with anybody else at the district attorney's office?

A Yes.

Q Did you discuss – with whom did you have these discussions?

A With various members of the DA's office when issues would arise in our office, just in general terms.

Q Now, in your preparation for the penalty phase of this trial, did you become familiar with the mitigating factors contained within Pennsylvania's death penalty statute?

A Yes.

Q And do you recall whether you were familiar with any mental health mitigating factors?

A In this particular case or in the statute?

Q In general,

A Yes.

[17] Q And can you just tell us if you recall what your understanding of those mental health mitigating factors was at the time?

A I don't recall. I know that we delved into it at the time, but if there was mental infirmity present with a particular defendant, that it could somehow mitigate the sentence.

Q What's your understanding – what was your understanding at the time of what a mental infirmity was or is for purposes of the death penalty case?

A Any sort of disorder that would render him somewhat less culpable.

Q Now, when you say less culpable, do you mean by that having a lesser degree of criminal responsibility?

A Yes.

Q By the way, you mentioned – I asked you about the discussions you had in the district attorney's office.

When issues would arise, you would discuss them with Mr. Rompilla? Do you have any recollection of what types of issues would start that discussion?

A When there were other capital cases in the office or discussions about my experience and what I learned from the case and my opinion as to how to [18] approach the subject in general.

Q At the time of your representation of Mr. Rompilla – withdrawn.

At the time of representation of Mr. Rompilla, had you ever participated in defense of any other capital cases?

A No, sir.

Q So this was your first capital case?

A First and last.

Q Okay. Prior to Mr. Rompilla's case, had you any involvement in any other homicide matters?

A Yes.

Q Any first degree homicide cases?

A No.

Q Second?

A Potentially first degree cases that pled.

Q Okay. Did you ever have a trial on a first degree case?

A No, sir.

Q Did you ever try a second degree homicide case?

A No, sir.

Q Third degree?

A No homicide cases.

Q No homicide trials?

[19] A That's correct.

Q Did you have any appellate responsibilities in the public defender's office?

A No – well, let me backtrack. We had appellate counsel in the public defender's office, but initially post-trial motions were filed by trial counsel and briefed at this level and subsequently taken over by appellate counsel.

Q Now, you had some contact with mental health professionals in regard to Mr. Rompilla's case?

A Yes.

Q And were you responsible on the defense team for making those contacts?

A Both Fred and I would discuss who to contact. I think the discussion of who to contact was probably made by Attorney Charles, but, yes, I believe I made the contact with the individuals.

Q Do you have a recollection as to when you first contacted a mental health professional in regards to Mr. Rompilla's case?

A No.

Q Do you remember who the mental health professionals were that you did contact?

A Yes.

Q Can you tell the Court who they were?

[20] A Dr. Cooke, Dr. Sadoff, and Dr. Gross.

Q And do you have a recollection independently of what order in which you contacted them?

A No.

Q Do you have any recollection that there was any gap between the times that you contacted the three mental health people, or did you just basically contact them all at the same time?

A I don't recall.

Q Do you recall presenting any of the mental health people that you contacted in regard to this case with a theory of mitigation?

A I believe that I explained to them the purpose for my contacting them, and the purpose was to initially see if there was any issue of mental infirmity or mental insanity for the guilt phase and subsequently to possibly use in mitigation any mental infirmity if it – the jury came back first degree.

Q Did you give them anymore of a specific sense of the things you were interested in having them explore?

A I don't recall that.

MR. WISEMAN: Your Honor, I'm going to ask to have marked three documents.

* * *

[21] (Whereupon, Defendant's Exhibits Numbers 1, 2 and 3, were marked for identification.)

MR. WISEMAN: Would, Your Honor, like copies?

THE COURT: Yes.

Q I'm going to place in from of you, Ms. Dantos, what's been marked as Defendant 1, and I'll be referring to that. Just a couple of questions before we discuss that exhibit.

A Okay.

Q Dr. Gross saw Mr. Rompilla on one occasion, is that right?

A As far as I know, that's correct.

Q And he wrote one report?

A Yes.

Q And does Defendant's Exhibit 1 appear to be a report that he wrote in regard to his evaluation of Mr. Rompilla?

A Yes, although it has attached to it I believe notes.

Q They appear to be Dr. Gross's notes?

A That's correct.

Q Now, I direct your attention to the top paragraph of the report which is addressed to you by the way.

[22] A Yes, it is.

Q And it says, just to quote you on one of the sentences, I've had the opportunity to evaluate Ronald Rompilla, a divorced, 40-year-old man, per your request. The

purpose of this evaluation is to determine Mr. Rompilla's mental state during the time of the alleged charges, unquote. Did you see that section there?

A Yes, I do.

Q Is that a fair statement by Dr. Gross as to what your request was of him in regards to Mr. Rompilla at the time of his evaluation?

A As best I can recollect.

Q It then goes on to say that the report is based on, quote, an evaluation, unquote, conducted on June 4th, 1988?

A Yes, it does.

Q I'm going to hand you Exhibits 2 and 3.

A Um-hum.

MR. WISEMAN: Just so the record is clear, Exhibit 2 is a letter of Dr. Sadoff, and Exhibit 3 is a letter of Dr. Cook.

Q Now, Exhibit 2 is a letter, is it not, from Dr. Robert Sadoff, again addressed to you regarding an examination that he did of Mr. Rompilla in September [23] of '88?

A That's correct.

Q Do you know of any other examination or evaluation that Dr. Sadoff did in regard to Mr. Rompilla other than that one?

A I do not.

Q And did he issue any other written reports or memoranda regarding his evaluation?

A No, he did not.

Q Exhibit 3 is also a letter written in this case by Dr. Cooke again addressed to you dated June 20th, '88, is that right?

A That's correct.

Q And it also refers to a quote, unquote, psychological eva' iation of Mr. Rompilla that Dr. Cooke conducted?

A Yes.

Q Aside from that evaluation, evaluation referred to in that report, do you have – do you know of any other evaluation that Dr. Cooke did in regard to Mr. Rompilla?

A I do not.

Q Is there any written report or memorandum regarding information findings, other than what's included in that exhibit?

[24] A Not that I know of.

Q Now, did you ask Dr. Cooke essentially to do the same evaluation, some type of evaluation that you asked Dr. Sadoff to conduct?

A I believe I did.

Q And would that also be true of doctor – I'm sorry. I misspoke.

Is the evaluation you asked Dr. Cooke to do essentially the same evaluation that you had asked Dr. Gross to do?

A As best I can recollect.

Q And would the same be true of Dr. Sadoff's evaluation?

A I believe so.

Q So would it be fair to say that all three of the mental health professionals employed by the defense in this case were asked by you and/or Mr. Charles to look into Mr. Rompilla's mental state at the time of the commission of the offense?

A Yes.

Q But I believe also included in that request would have been, you know, his current state, and I believe they did, in fact, evaluate that his current competency to proceed?

A That's correct.

[25] Q So all three evaluated competency to proceed at the time of the offense?

A As best I can recollect.

Q Did your mitigation theory change at all after you read the reports of Dr. Cooke and the – I'm sorry, the letter of Dr. Cooke, the letter of Dr. Sadoff or the report of Dr. Gross?

A Did it change? Well, I believe that we, after reviewing Dr. Gross's letter and speaking with all three of these individuals, determined that that was not something that the mental infirmity, or any type of mental state, was not something that we could present in terms of mitigation on behalf of Mr. Rompilla.

Q And prior to their conducting their evaluations you had no opinion as to whether such a mitigation defense was available?

A Well, naturally we would have wanted to proceed under that theory. Had there been some evidence of that, we would have.

Q Do you recall what you gave to each of the three mental health people prior to their evaluation of Mr. Rompilla?

A No, I do not.

Q Do you know if you gave them police reports [26] about the case?

A I believe they were provided with some information, but to be honest, I couldn't tell you now what that information was.

Q Did you do, by you I mean your office, either you or Mr. Charles or any investigator or attorney working at your behest, did you do any investigation into Mr. Rompilla's schooling prior to having the mental health evaluators evaluate?

A Outside of questions to the family and general questions to Mr. Rompilla himself, I would have to say no.

Q What questions did you ask Mr. Rompilla about his schooling?

A Mr. Rompilla and I had a lot of discussions about himself, about who he was and his life.

Q If we could just – if you can focus on school though first if you remember?

A I can't tell you what specific questions I asked him. I can tell you that we had discussions about himself and his past, but I can't tell you that I specifically asked him who his teachers were in school or anything of that nature.

Q Did you ask him anything about his performance in school?

[27] A I don't recall.

Q Well, let me ask it to you this way then, knowing what you know about the preparation of a penalty phase in a capital case, would it be appropriate to ask a person about their school record?

A I believe so.

Q And would it be appropriate to ask your client in that setting whether they achieved well in school or did poorly in school?

A I believe so.

Q Why would that be important?

A Because I think you would want to know as much about a person's past and how they performed and that that indicated about what was going on with them emotionally and psychologically at the time.

Q So for example if someone did poorly in school, that might be an indication of an underlying mental defect?

MS. PARADIS: Objection. Leading question.

THE COURT: It is. I'll permit it.

A I don't know that I'm qualified to answer whether someone doing poorly in school is indicative of mental defect or indicative of anything in particular. [28] But I would think that it would indicate that there was something going on with the person.

Q And that's something that you would want to provide to your mental health professionals for their evaluation?

A Yes.

Q Did you ever obtain Mr. Rompilla's school records?

A I don't recall obtaining them, no.

Q I'm confused by the answer. Maybe it's me. You didn't get them, or you don't remember?

A I don't remember getting them, so I can – I mean I'm answering you as honestly as I can. I don't remember ever seeing any, so I would assume that we didn't get any. That's the best I can do.

Q Now, just to give the Court a sense of your understanding of counsel's role in a penalty phase, if you did get Mr. Rompilla's school records, and they showed him to be in the mentally retarded range on an IQ test, isn't that something that you would feel would be an important thing to give to your experts?

A Yes.

Q Is that something that you would feel would be an important thing to present to the jury?

A Yes.

[29] MR. WISEMAN: If I could have marked two more exhibits.

* * *

(Whereupon, Defendant's Exhibit Numbers 4 and 5, were marked for identification.)

Q I'm going to show you, Ms. Dantos, what's now been marked as Exhibits 4 and 5. I'll be asking you some questions about those documents. Are you familiar generally with IQ testing?

A No. No.

Q I'd like to direct your attention on Exhibit 4 to the middle of the page.

A Um-hum.

Q There's an entry that says 10/59, and then there's a space that says WISC.

A I see it.

MS. PARADIS: Objection. There's been no – first of all, we don't know that this witness is familiar with what these documents are, and certainly she doesn't have the expertise to evaluate these documents. What they appear to be are the defendant's birth certificate and school records of which she was not privy. And I don't see how she can interpret these documents.

THE COURT: Well, she hasn't been [30] asked that yet.

MS. PARADIS: The question is about interpreting the middle of the page.

THE COURT: Did she?

MR. WISEMAN: Why I was asking that –

THE COURT: Did she see something on there? I don't know where it's going, Ms. Paradis, but let's see.

Q So I was pointing your attention to the column that says WISC.

A I see it.

Q If you go along further skipping a column 11-6 you see an entry that says V 61, P 57.

A Yes.

Q Next to FS 64.

A Yes.

Q Do you recall ever having seen this document at the time you were representing Mr. Rompilla?

A No.

MR. WISEMAN: Now, Your Honor, just so the Court knows where I'm going, I will be bringing in expert testimony as to the interpretation of these results, but I do want to be permitted to ask the witness some questions about them, assuming I'm [31] able to connect it up later with my expert. Obviously if I can't, then –

THE COURT: Well, let's see where it's going. Ms. Dantos already said she's not familiar with the IQ testing I believe.

Q All right. Ms. Dantos, assume if you would that you presented the entries I just read to you to your mental health expert, and your mental health expert told you

WISC is the IQ test that was used back in the 1950's and 60's, and that the IQ that Mr. Rompilla achieved on that test was a 64, and further assume that 70 is the cutoff for mental retardation.

I'm sorry. I misspoke. Seventy-five is the cutoff for mental retardation. Assume that your expert told you all that. Is this type of score something that you'd want to present to your mental health expert?

A Yes.

Q And is it something that you think would be important to let a capital jury know about your client?

A Yes.

Q That he's mentally retarded on an IQ test?

A Yes.

Q By the way, do you remember roughly [32] Mr. Rompilla's birth date or – I don't want to quiz you.

If I told you he was born 1948, I think that's on top of the report, that sounds about right to you?

A Yes.

Q So at the time that he achieved the score of 64 he was about 9 or 10 years old or 11 years old I guess?

A Eleven.

Q Eleven years old?

A Yes.

Q The entry right below that one is 6/61 stan., says stan, S-T-A-N period A-C-H period. Assume if you would,

again subject to, Your Honor, my expert's confirming this, assume, Ms. Dantos, that it's a shorthand way of writing Stanford Achievement Test?

A Okay.

Q Assume also that the R refers to his reading level, and that number 3.3 means that in 1961 Mr. Rompilla was 13 years, he was reading at the third grade level. Is that something that you would want to provide to your mental health expert in the context of a capital case?

A I believe so.

[33] Q And if he was spelling – assume that 4.1 means that he is spelling at a fourth grade level. Is that something that you'd want to present to a mental health expert?

A Yes.

Q And present to a jury as well?

A I believe so.

Q And the last entry there, A for arithmetic, says 3.5. Is that something that he's doing arithmetic at a third grade level when he's 13 years old, is that something that you think would be important to present to your expert and to the jury?

A I believe so.

Q Now, if you look down towards the bottom of that page you'll see an entry, and the entry says elementary school. And then you'll see year '53 to '54 all the way down to '60 to '61, do you see that?

A Yes.

Q And next column says grade K or kindergarten, 1, 2, 3 and then it stops. Do you see that?

A Yes, I do.

Q Following that is SP. You see that?

A Yes, I do.

Q Assume if you would that SP means special education. That was the grade or class he was in from [34] 1957 until he was through elementary school. Would the fact that your client was in special education classes be a fact that you'd want to present to your mental health expert in a capital case?

A Yes.

Q Now, if you turn to page two of that document and look towards the bottom left you'll see the entry that says 12/61.

A Yes.

Q And again we see the entry WISC.

A Yes.

Q And we see what the IQ, looking over to the right, says FS 69. Assuming again that that is a full scale IQ of 69, which is below the mentally retarded range, is that something that you'd want to obviously give your, and you said with your prior answers, present to a mental health expert, to a judge?

A Yes.

Q If we could just flip back to the first page, the first entry on the IQ section is dated '54 and has test SRA and

to the right column under IQ it says 6 and it appears the second digit is not legible, is that right?

A That's correct.

Q All right. Assuming Mr. Rompilla didn't have [35] an IQ of 6 he had an IQ of 60 something apparently on that test according to this record?

A As best I can read.

Q That's what it says?

A That's what it says.

Q And then on the column, the line below that, 4/57 being the date, again the WISC test has him on the verbal – excuse me. Has him within an IQ of 75, is that right?

A Yes.

Q Okay. Now, if you look to the left you'll see a V?

A Yes.

Q And again, do you see P in that column?

A I do not.

Q Now, again, those IQ tests which are in the 60's and again in the mid-70's that's something you'd want to have told your mental health expert about if you'd known it?

A Yes.

Q Did Mr. Charles ever discuss with you these IQ tests?

A Not that I recall.

Q Do you have any reason to think that he knew about them and might have mentioned them to you at any [36] time?

A No.

Q Now, why would you want to present evidence that your client was in special ed. to your mental health expert, and by that I mean, what's in your view the significance of special education, what's its meaning in this context?

A That the – that the individual is not functioning in a level appropriate for his age.

Q And that may be because he has a mental infirmity of some sort conceivably?

A Conceivably. But I can't – I don't know. I don't know.

Q. I understand that you don't know. My question is, is that the reason you give it to mental health?

A So they can find out.

Q They can find out for you?

A Right.

Q It's a red flag that there may be something going on with your client's mental health?

A It's an indication that there is something to look into.

MR. WISEMAN: Your Honor, just so the Court understands, the next exhibit was also part [37] of the school records that were provided to us by the Allentown School District that came into separate production, and I've just marked them separately.

MS. PARADIS: Your Honor, at this point, again, I don't know what agreements have been made with Mr. McIntyre, but I would object to the introduction of the records in this fashion. And I'm going to reiterate my objection that I don't believe this witness is appropriate to be analyzing these records and making discussions on what they mean and what they don't mean. I don't believe that the records have been properly introduced for one thing.

THE COURT: They are not even being offered yet. I'm not sure where –

MS. PARADIS: Your Honor, Mr. Wiseman indicated that he'd like to offer this particular record at this time.

MR. WISEMAN: I don't believe I did offer it. I'm going to be offering it, Your Honor. There's two different issues here. One is relevance to examining this witness on these records, and we can take the first issue which is the way we get them. But these were gotten from the Allentown School District.

If the district attorney wants us [38] to, we can go and serve a subpoena on them. They will bring the same record to court, and obviously it's admissible as a business record. I don't think we need to do that. If we need to, we'll certainly do that.

As to why this point – it's proper to examine this witness on these records, and obviously our claim is that Mr. Rompilla received a defective assistance of counsel and among otherwise the effectiveness related to failure to investigate mark and present evidence.

Related to mitigation, obviously as the witness said it's our position that these are mitigating facts that should have been before the jury, and they weren't. So certainly it's relevant to examine whether she did or not and what her reasons may have been.

THE COURT: I'm really not sure what the objection is at this point in time.

MS. PARADIS: My objection was to the form in which these document [sic] are coming in to evidence. And again –

THE COURT: What do you mean?

MS. PARADIS: They – the proffer was, and perhaps I didn't hear correctly, but I believe Mr. Wiseman said at that time I'd like to offer the [39] record of the school district. Well, usually that requires a witness to introduce it.

THE COURT: Would you like him to subpoena the –

MS. PARADIS: As I said, I don't know what agreements have been made with Mr. McIntyre. That would be my objection.

MR. WISEMAN: I've made no agreement with Mr. McIntyre about objections. The only question is from our perspective the authentication of records. And if that's the objection, the Court will subpoena the school district.

THE COURT: If that's the objection, then you'll have to do that I guess.

MR. WISEMAN: Is that the objection?

MS. PARADIS: That and I reiterated my objection about having this witness interpret results that certainly she doesn't – she indicated she doesn't know anything about the test.

THE COURT: She hasn't been asked to interpret these.

MS. PARADIS: Okay.

BY MR. WISEMAN:

Q Now, Ms. Dantos, we have just covered all the [40] school records and IQ testing. In preparing for a capital case and particularly in the penalty phase, is your client's relevant medical history something you'd want to look into?

A With regard to what, looking for what?

Q Well, in your view, are there things that can happen to a person medically that could effect their mental health, is that within the realm of possibility in your understanding of mental health?

A I suppose it is. I suppose it is.

Q And, again, that's something that you'd want to conceivably look into to provide your mental health experts?

A If there were such a thing, I suppose that's correct.

Q Did you ever gather up any medical records on Mr. Rompilla?

A Not that I recall.

Q Do you recall if Mr. Charles ever did this or anyone else affiliated with your office?

A Not that I recall.

Q If I were to tell you that at age two Mr. Rompilla was admitted to the hospital with a 105 fever, is that something you think you would want to have your mental health expert look at?

[41] A Yes.

Q Is something that in your view conceivably could have affected his mental development or his organic development?

A I suppose it would depend. I mean fevers in children I don't think are unusual, but I suppose it would depend on the other circumstances surrounding that.

Q It's something you don't feel qualified to –

A Absolutely not.

Q – have an opinion?

A That's right.

Q Again, it's something you would want to present to your mental health person?

A I suppose you could have someone else evaluate it.

* * *

(Whereupon, Defendant's Exhibit Number 6, was marked for identification.)

Q I'm going to show you what's been marked as Exhibit 6, which is a packet of medical records.

MR. WISEMAN: Your Honor, if the district attorney – I guess I'd like to know if the district attorney is going to have the same objection, and again we'll need a subpoena from the hospital as [42] well if she's going to have the same objection.

These records are obtained from Sacred Heart Hospital. They include the entry regarding the drawing of blood at the time of Mr. Rompilla's arrest in this case. And the other entry is from when he was two years old.

THE COURT: You probably haven't had the opportunity to look at them.

MS. PARADIS: I have not had the opportunity, and I am doing that right now.

THE COURT: Take your time. The objection is to authenticity?

MS. PARADIS: Again, I have difficulty – first of all, I have difficulty reading these. I really can't even tell you what's on them for the most part. I can read bits and pieces of it. I believe that we would be put to the task on this. So I'm going to object. This is his hearing, and I believe it's appropriate for him to bring in the original record. I can't make head or tail out of this.

MR. WISEMAN: We'll do that, Your Honor. In the mean time if I could, subject to that authentication, if I could ask Ms. Dantos a couple of questions. I believe the exhibit is open to the page I [43] was interested in.

Q Ms. Dantos, if you look at – it's kind of hard to point out – the entry for final diagnosis. It appears to say diarrhea due to undetermined cause?

A That's what it appears to say.

Q If you look further down the page you'll see a notation that says P105?

A Yes.

Q And assuming that that refers in medical terms to temperature of 105?

A Yes.

Q It would appear this is a record of a hospital admission for Mr. Rompilla with a 105 fever?

A Yes.

Q And if you look at the very top of the document it says age two?

A Yes.

Q Now, again, if this is something that you would have had back at the time of the trial proceedings, you would have given this to your expert for evaluation?

A I'm not so sure. Now that I have read as much as I can read of it, and it seems to be that he had diarrhea with a fever that was treated, he responded and was released.

[44] Q A fever of 105 though, right?

A For a child, yes.

Q That's a high fever for anybody, isn't it?

A Well, not in a child.

Q So your position is you would not give that to a mental health expert for an evaluation?

A Probably not.

Q You wouldn't even hand it over to him?

A I might. I might. But, you know, you're asking me if my opinion is, is a 105 fever with diarrhea something that could create some sort of mental infirmity or defect, and in my opinion, which is not obviously to any degree of medical certainty, I'd have to say no.

Q All right. I'm just trying to understand what is your view of this issue. Do I understand you to be saying that you wouldn't give it to your mental health expert or you would?

A No. If I had it I probably would turn it over. But if you're asking me if it – if I believe that this is indicative of something serious, I would have to say probably not.

Q Would you have had a tactical or strategic reason for not turning it over?

A No, sir.

[45] Q So if you had it, you'd give it to him and see what the doctor has to say about it?

A That's probably true.

Q You mentioned that you discussed some things about Mr. Rompilla with his family?

A Yes.

Q In fact, you put three of his family members on the stand during the penalty phase?

A Four I believe.

Q Is it four? You're right. Four. That's right. And it would have been his brother, Nick?

A His brother, Nick; his sister-in-law, Darlene; his brother, Bobby and his son, Aaron.

Q Now, do you recall – do you recall did you talk to other family members other than those four?

A I spoke with his ex-wife who was present during a lot of the trial. And I don't recall who else I spoke to, to be honest with you. And I don't have my notes.

Q Do you have a specific recollection of discussing any of the mitigation – withdrawn.

Discussing with any of the family members aspects of Mr. Rompilla's childhood?

A Yes.

Q Do you recall what aspects you discussed?

[46] A I asked them in numerous meetings to tell me about Ron and to – we discussed his upbringing and his childhood. And you have to understand that they were coming from the position that Ronald was innocent. And, therefore, they weren't looking for reasons for why he might have done this. And although I asked the questions, they did not tell me anything noteworthy about his childhood, about his family dynamics.

The responses that I got from his family were that they loved each other, and they were supportive.

Q Now, Ronald Rompilla's oldest sibling is a woman named Barbara Harris. Do you recall that?

A I recall the name, yes.

Q Do you recall having a discussion with her about Ronald? She wasn't one of the people that you just talked to?

A I don't know if I spoke with her or not. I would assume that I had.

Q Obviously talking to his young son you couldn't have talked about obviously his upbringing, right?

A His son's upbringing?

Q About Mr. Rompilla's.

A Obviously.

[47] Q Right. Silly question. To some degree that would be true, though, with his younger siblings, isn't that right? Robert, for example, Robert is somewhat younger than Ronald?

A Yes, as I recall. But I did talk to them about that, and, you know, the overwhelming response from the family was that they didn't really feel as though they knew him all that well since he had spent the majority of his adult years and some of his childhood years in custody.

And they were coming from a point of since his release that they were trying to get back to the family unit and get to know each other and try to make it work as a family. But there wasn't a lot that they knew. And, in fact, Nick, who was probably one of the more interested in what was going on in this case, himself was out of the home at a very young age.

Q This is Nick, the brother?

A Yes.

Q Because Ronald's father is also Nick?

A Nick the brother.

Q Just for clarification purposes, let me just back up for a second. When you say since his release, so the record is clear on the time frames here, approximately – Mr. Rompilla was incarcerated in the [48] mid-70's until approximately three months before his arrest on this case?

A Yes.

Q So he was in jail for roughly –

A Fourteen years.

Q Fourteen years. And you were aware also that he spent quite a bit of time in jail as a juvenile as a youngster as such?

A Yes.

Q Now, did you ever have a discussion with the Rompilla family, of the people you spoke to that is, about leaving aside feelings about he didn't do the crime, he may be not guilty or looking for an acquittal and discuss with them nonetheless the importance of mitigation?

A Yes. Definitely.

Q Was your awareness – what was your awareness of mitigation or potential mitigating evidence in the context of a client who maintained their innocence?

A I don't understand your question.

Q Does mitigation have a role in a capital case even if your client is telling you they are innocent?

A Yes.

Q So the fact that Mr. Rompilla was telling you he was innocent, and I take it he was telling you that?

[49] A Yes.

Q And the fact that his family was telling you that, didn't prevent you, or stop you or dissuade you from pursuing litigation, you recognized your duty to do that?

A Of course.

Q And so you had no strategic reason not to look into mitigation?

A I looked into mitigation.

Q And to the extent that you looked into it, you had no strategic reason not to look further or into other areas?

A Right.

Q Such as the areas we've covered so far?

A Right.

Q Did you ever ask anyone in the family that Ronald's mother, Mr. Rompilla's mother, drank during her pregnancy?

A Did I ask them that specific question, no.

Q Yes?

A No.

Q Did you ask anyone in the family if either of Ronald's parents were alcoholics?

A I believe I discussed alcohol and other substances in the family, and there was nothing.

[50] Q People just flat out denied that anyone had a drinking problem in the family?

A I can't tell you whether or not they flat out denied it. I can tell you that there was nothing exceptional presented to me about drinking within the family, no.

Q Did you visit the family home at the time, check it out, look around?

A I don't believe so, no. No.

Q Did you ask anybody in the family the specific question as to whether Ronald or any of his siblings were ever beaten by his mom or dad?

A I don't know that I asked that specific question. Again, I know we discussed the family dynamics and what his family relationship was with his parents. And it was never indicated that there was any sort of abuse within the family.

Q How did you ask that question? When you say you discussed the family dynamic, I'm not sure what you mean by that. How did you –

A Well, I think you probably do, but you're asking me whether I recall specific questions put to a family eight years ago, and I can't tell you that. What I can tell you is that I spent hours with these people, and that we talked about the family, and we [51] talked about Ron, and that I explored all that I thought I could with them, given their responses and given their limited knowledge of their brother.

So in a general sense I can tell you I asked about, you know, what was Ron's relationship with his parents. But,

no, I mean I didn't – I can't recall asking specific questions about whether his mother drank during her pregnancy.

Q You've been a criminal lawyer now for I guess 11 years, give or take?

A Something like that.

Q During that time have you had occasion to either defend or not defend, did you have any involvement in any cases involving issues of child abuse, beatings, or sexual abuse, anything along those lines?

A No.

Q Trying to get back to your thinking on the subject back in 1988, are you aware of any literature or any thoughts regarding – professional thoughts regarding the denial of abuse by those who are abused? Sometimes people who are abused deny it for reasons of mental health and psychology, that neither of us are experts on.

A Right.

[52] Q And you're aware of a denial dynamic if you will back at the time of this case?

A Yes. And that is why you at times rely on other people to give you that information such as siblings, such as your psychologists and psychiatrists to conduct their interviews and ask questions in a manner that would elicit this sort of information.

Q Now, if I could direct your attention back to Dr. Gross, after Dr. Gross gave you his report, I think you said he had no further involvement with evaluating Mr. Rompilla or giving you reports?

A As far as I recall, yes.

Q Basically we're done with that?

A I believe so.

Q If you could look at Dr. Gross's report which is Exhibit 1?

THE COURT: Let's take a ten-minute recess at this time. We'll be in recess for ten minutes.

* * *

(Whereupon, a recess was taken.)

Q I think before we broke, Ms. Dantos, you had indicated that you spoke to some members of the family, but there are a couple that you didn't talk to. And I think you didn't talk to Barbara Harris, is that right?

[53] A I don't remember whether I did or not.

Q Do you remember if you spoke with another one of Ronald's sisters named Randy Rompilla?

A I don't remember.

Q But it's safe to say nobody in the family gave you any inkling of an alcohol problem?

A That's correct.

Q Either on the part of Ronald or other people in the family?

A That's correct.

Q Did Ronald just flat out deny to you that he drank at all, but he said he drank but it wasn't a problem?

A Ron's position was that he could handle it, that he had a few beers now and then, but nothing out of the ordinary.

[53] Q Now, you specifically questioned Ronald about his drinking?

A Yes. Because it came up specifically in the case. And then we talked about it a little more.

Q You mean the facts of the guilt phase of the case?

A Correct. That he had been at the bar that night.

Q And this – the killing was at a bar?

[54] A Right.

Q And in Ronald's response to – I'm sorry. I keep saying Ronald, Mr. Rompilla's response to that was essentially that he drank sometimes, but he could handle it, he was not an alcoholic, doesn't have a problem?

A Right. In fact, I think he told us how many beers he had that night, and it was over the course of an evening, three or four beers.

Q Did you see any potentially mitigating value in this capital case or any capital case as to whether or not a person has a drinking problem?

A If they were an alcoholic.

Q An alcoholic or however one would define a drinking problem?

A Yes. I would think that that would be something that you would want to present.

Q Did any of your mental health experts discuss with you, either orally or in their writings, their views of whether or not Mr. Rompilla had a – whether Mr. Rompilla's drinking was somehow relevant to this case?

A I believe so.

Q And do you recall when that was?

A Not – I don't recall the specifics with Dr. [55] Cooke and Dr. Sadoff, but I recall that in Dr. Gross's letter there is an indication that Mr. Rompilla denied any alcohol abuse. But I think that Dr. Gross also indicated that there could be some violent behavior with drinking.

Q Why don't you look at Dr. Gross's report so you don't have to rely just on your memory of what it says. If you look at page 3 in particular –

A Yes. Yes.

Q It ends with a recommendation of this area, meaning alcohol abuse should be explored further, isn't that right?

A Well, I'm not sure that this area in that sentence refers specifically to alcohol, but you could read it that way.

Q All right. Let His Honor I guess decide that. The paragraph immediately above that one, sentence recommendation says, in my opinion – I'm sorry. Further down in the paragraph, the possibility does remain, however, that Mr. Rompilla, while under the influence of alcohol, had become prone to violent behavior, although he himself strongly denies this.

And then the next paragraph, my recommendation of this area should be further evaluated before definite conclusions are drawn. Would you agree [56] that's a fair reading of the report, that this area, quote, unquote, is referring to the alcohol use Mr. Rompilla denies having had?

A I think that you could read it that way, yes.

Q Do you remember if you read it that way?

A I don't remember if I read it that way or not. I know there were two other evaluations however.

Q Would you agree that Dr. Gross's evaluation that the alcohol issue needed further evaluation was made, even though Mr. Rompilla denied having an alcohol problem to Dr. Gross, is that right?

A Yes.

Q Okay. So Mr. Rompilla denied alcoholism to you, people in his family denied it to you, and Mr. Rompilla denied it to Dr. Gross, is that a fair summary?

A It appears to be that way.

Q And yet Dr. Gross felt the need of further exploration?

MS. PARADIS: Objection. Objection.

MR. WISEMAN: Fair enough. Withdrawn.

Q Dr. Gross's report indicates that it needs further explanation?

[57] MS. PARADIS: Objection. Your Honor, again the report did not indicate that the area of alcohol

abuse needs further investigation. If the Court has that letter in front of it, the last page, that's a real subjective interpretation. It could mean that the area of mental health needs further investigation. Depending on how you read it, it could mean anything.

THE COURT: Yes. I tend to agree, Mr. Wiseman.

MR. WISEMAN: Your Honor, Dr. Gross will be a subject of these proceedings or brought to these proceedings I guess.

THE COURT: Ask it then.

MR. WISEMAN: Right.

Q Ms. Dantos, do you recall doing anything further about – assuming for the moment this is discussing alcohol, would it be to explore it further, do you recall doing anything to further explore it at this time?

A Well, as I said, there were two subsequent evaluations conducted by Cooke and Sadoff. So to that extent, yes.

Q Did you do anything aside from having those two people see Mr. Rompilla, did you do anything to [58] further explore it?

A No.

Q Did you request of Dr. Gross that any type of neurological testing be done?

A I don't believe so, no.

Q Did you request of Drs. Cooke or Sadoff that either neuropsychological or neurological testing be done?

A I don't believe I made any specific requests for any specific sort of testing from either of those two.

Q Ms. Dantos, you probably remember at the penalty phase there was a rather large disagreement between the defense team and the prosecution in regard to the reading of the transcript of the prior rape conviction Mr. Rompilla had?

A Yes.

Q Just so the record is clear on it, that was – the prosecution wanted to read the testimony of the victim of the prior rape that Mr. Rompilla was convicted of?

A The direct testimony.

Q The direct testimony. Good point. The direct testimony of the rape victim of the prior case.

A Yes.

[59] Q Now, do you recall having had the transcript of that testimony prior to the penalty phase? I think, the transcript pretty clearly reflects you didn't have a copy of it?

A I don't recall having it.

Q You don't recall having it?

A Right.

MR. WISEMAN: So the record is clear, I'm going to be referring to a transcript of the proceedings of November 1, 1988 starting on page 31. Ms. Dantos says we need to look at the indictment. And referring to the indictment of the prior case that he is charged with, committing the burglary and then it's cut off. So it seems from that statement you made on the record, page 31, that you

had not or you didn't have a copy of the indictment handy with you, is that right?

A I don't – I don't recall.

Q So does this refresh your memory, the statement on the record that you need to see the indictment?

A If I said we need to look at it, obviously I didn't have it in hand.

Q Further down the page, Mr. Moyer, the prosecutor, says I had a copy, and I forgot to bring it [60] with me. And Mr. Charles says, can we see it, Judge. And then Mr. Moyer again says, it's a public record, Fred, you could have gone over lunch and looked at it just like I did. Does that refresh your memory as to whether you and Mr. Charles had the indictment of the prior case during the penalty phase?

A I mean clearly we knew about it. Whether or not we had the document at the time, I can't tell you. And, no, that doesn't really refresh my memory. But by the lines that you have just cited, it appears as though we didn't have it in hand.

Q Referring now to page 35 of the same proceedings. You addressed the Court. You said, Judge, can I request that you review the transcript first. Mr. Moyer says, I have no objection. And you say, I would like to review whatever he's going to read from. I take it at that point you're referring to the transcript.

Does that refresh your recollection as to whether you had the transcript of the testimony prior to the penalty phase in your possession?

A I believe that I did not.

Q Would it be fair to say that you hadn't examined that court file in the prior case prior to the [61] penalty case?

A No, that would not be fair to say.

Q Oh, you did examine it?

A It would be fair to say that we were aware of his priors, and we were aware of the circumstances. It would be fair to say that it appears as though I did not have the transcript of the direct testimony of the victim in this case, which was to be read to the jury.

Q All right. Do you recall actually going to look at the court file?

A I believe we had some things that we reviewed about it, yes.

Q We meaning you or –

A And Fred.

Q Together?

A Mr. Charles and I.

Q Looked at the court file?

A Looked at – I don't know if it was the court file that we looked at or documents that we somehow had access to either from the DA during discovery or on our own.

Q Now, not to be argumentative about it, I just want to make sure I understand. What you're saying is that you looked at some documents that clearly had come from the court file which you don't recall, and you [62] don't recall

whether you retrieved them from the file or they were provided to you –

A Right.

Q – from the district attorney?

* * *

(Whereupon, Defendant's Exhibit Number 7, was marked for identification.)

Q I'm going to show you what's been marked as Exhibit Number 7. I want you to take a look at that. Have you had a chance to look at it?

A Yes, briefly.

Q Did you review this when you reviewed the petition, this particular document which was attached to the petition?

A No.

Q If I could ask you – well, let me ask you generally if you have ever seen this document before?

A I don't remember seeing it before, no.

Q Is this material that you – well, withdrawn.

If I could ask you to look at the fifth page which says – that starts – it's entitled test status summary.

A Yes.

Q And look at the section that's labeled number two, achievement, and go down to the area of spelling [63] score and arithmetic score.

A Yes.

Q You look over on the right it says for spelling score fourth percentile and arithmetic score third percentile?

A Yes.

Q These are tests administered according to the document in the mid-1970's, 1976, by the Pennsylvania Department of Corrections to Mr. Rompilla when he was admitted on a prior conviction. Do you think being in a fourth percentile and third percentile respectively with regard to spelling and arithmetic are facts that you would have wanted to provide to your mental health expert at the time of the trial proceedings had you had these facts?

A I probably would have.

Q And, again, as we discussed with the IQ testing, that's because obviously it shows some evidence or red flag, if you will, to explore mental health issues?

A It might, although I note that the IQ is significantly different than that of the earlier documents you showed me.

Q The beta IQ?

A Right.

[64] Q That says 93?

A Right.

Q And you would want to present that to your expert and ask them to explain to you how it's different and whether the difference is something that's significant from the mental health perspective?

A Sure.

Q Now, are you familiar with the psychological testing MMPI from your work as an attorney?

A I'm familiar that it is conducted.

Q Okay. It's the Minnesota Multiphasic Personality Inventory?

A Right.

Q Did you see a score, or set of scores I should say, for that test on the middle portion of this document?

A Yes.

Q Do you know how to read those tests?.

A No.

Q All right. Well, assume if you would that Mr. Rompilla on this test scored abnormally high on schizophrenic scale, is that something that you'd want to present to your mental health expert?

A Yes.

Q For obvious reasons, right?

[65] A Right.

Q Similarly scored high on the paranoid scale. Is that something that you'd like to present to your mental health experts?

A Yes.

Q Obviously if there's schizophrenia, right?

A Right.

Q The fact that he scored abnormally high I should say. Assume the fact that if he scored abnormally high on the hypochondriacal scale, is that something you'd want to show mental health experts?

A Yes.

Q Similarly if he scored abnormally high on the neurosis scale, is that something that you'd want to present?

A I'm sure I would.

Q And similarly on the obsessive/compulsive scale?

A Yes.

Q You don't recall ever providing this document to any of your mental health experts, is that right?

A That's right.

Q In regard to the same MMPI result, assume if you would, that the most prominent profile that comes out of that test is what's known in the business as a [66] 4, 8 spike, and I'm going to be just referring to a page out of this book of the MMPI handbook. It's volume one, by Dolstrum, Welsh and Dolstrum.

Now, assume for the while that according to Dolstrum, page 873, that the prominent profile that Mr. Rompilla had in this test, among other things, is present in people who are impulsive.

Assuming that to be the case, is that impulsivity something that you'd want to present to a mental health expert?

A I suppose I would.

Q Would you assume also that it shows that people with that profile are underachievers, have marginal adjustment and uneven performance in life. Are those factors that you'd want to present to your mental health expert?

A I suppose so.

Q That the person with this profile is nomadic and live in social isolation. Is that something you'd want your mental health professionals to know when doing an evaluation of your client?

A Yes.

Q By the way, did you ever ask the family specifically whether or not Mr. Rompilla was ever in special education classes?

[67] A Again, I don't recall any specific question like that, no.

Q Did you ever ask the specific question as to whether or not he was ever left back in school?

A I can't say that I did or didn't. I don't recall that, no.

Q Did you specifically ask any of your mental health experts to look for brain damage in this case, organic brain damage, organicity?

A I believe we did.

Q Did you ask that?

A I believe so.

Q Was that based on any factor you had at your disposal?

A Not at all.

Q I'm sorry. Do you recall if any of your mental health professionals did any – forget I asked you that.

You indicate you don't recall whether they did any neurological testing, is that right?

A No. What I said was, I don't recall asking specifically for any specific tests was what I told you.

Q Do you know how one looks for brain damage?

[68] A No. Tests I would assume.

Q Now, there's no – I mean if you want to look at it that would be fine. There's no indication in Dr. Gross's report that he did any neurological testing, isn't that right?

A There's no indication in the report of that.

Q Obviously you would put it in if you did?

MS. PARADIS: Objection.

THE COURT: Sustained.

A I don't know.

Q As an attorney preparing a capital case, would you have expected your expert to put – withdrawn.

Would you have required your expert to put test results in a report that's giving you a full evaluation which Dr. Gross apparently was doing?

A Well, I know that we requested full evaluations from all three experts that we sent in, specifically from Cooke and Dr. Sadoff we requested that they did not write a report.

Q They just wrote you a letter?

A That's right. So their findings, and I do know that there was testing done by Cooke and Sadoff. I don't know specifically what they were, but I know [69] that their findings were negative.

Q Not helpful?

A Definitely not helpful.

Q Do you recall what testing Dr. Sadoff would have done?

A I don't.

Q Do you recall what testing Dr. Cooke would have done?

A I don't.

Q Do you recall that there was a break in the proceedings between the – between the prosecution's penalty phase preparation and the defense's penalty phase presentation?

A No.

Q Again, referring to the transcript of November 1st, '88, page 11, this is you speaking. I'll put a request on the record that I'm requesting on behalf of defendant that we have a break and we do not continue the penalty phase until tomorrow morning. And the Court replies, I'll tell you

what we'll do, you'll have until 1:30, of course referring to the prosecution, to prepare for his side.

We're going ahead with the Commonwealth's side at 1:30, and I will grant then if indeed he finishes early, we will let you go tomorrow [70] morning.

A I recall that.

Q So you asked for a break between the guilt phase and the penalty phase?

A Right.

Q And the judge said, well, I'll let the prosecution go, and then you'll go tomorrow morning?

A Right.

Q Now, I take it you needed that break?

A I think everybody needed that break including the jury.

Q Now, in regard to you in particular, why did you feel the need for that break at that time?

A I felt that the family, meaning the witnesses that I planned to present, needed some time to digest the fact that their relative had just been convicted of first degree murder before I put them on the stand to discuss the possibility of him getting life or death.

I felt that the jury, after having been in deliberation for overnight into the second day, needed a break and a time to get in touch with reality before having to make a life and death decision on a fellow citizen.

Q Were you prepared – I don't mean from – were you prepared to put the witnesses on yourself if [71] you had time?

A Yes.

Q If you had to have –

A Yes.

Q Sorry to ask you what may be obvious types of questions. You're obviously, you and Mr. Charles, were upset after the delivery of the guilt verdict.

A Obviously it was not necessarily unexpected which you all know, but you always hope for something other than first degree.

Q Do you recall when, prior to the delivery of the guilty verdict, that you had sat down and prepared your penalty phase witnesses? I mean did you do it a week before, a month before that day, that night, do you have any recollection of that?

A Well, I would say all throughout. Certainly during the course of the trial. Certainly I had spoken to them during the trial. Certainly we had had conversions with Mr. Rompilla. We were prepared.

Q Now, tell me if some of this is a fair statement or not. The witnesses that you put on in the penalty phase, with the exception of Mr. Rompilla's young son, essentially were testifying to what you just said earlier, to the three-month period between his last incarceration and his present incarceration?

[72] A And to their general relationship and feelings about him.

Q Do you recall anything in particular that any of the witnesses testified to about that three-month period?

A Who are you asking about?

Q Any of them that you recall.

A Yes.

Q What do you recall that they testified to?

A I recall that Mr. Rompilla's brother, Bobby, was upset with the verdict and also upset with the system. That during the period of Mr. Rompilla's release, between the time of his release from state prison until he was arrested on this incident, that he was upset with the system's lack of supervision.

Q Let me interrupt you there. Is that something that you discussed with Bobby before his testimony? Was that something that just sort of came out?

A We talked about it.

Q I didn't mean to interrupt.

A That's – that's what I remember. That's what Bobby was testifying to about that three-month period.

Q Was there any – do you have any other memory [73] as to what the other witnesses testified to about that three-month period?

A Not without reviewing it. I would – I believe I remembered Darlene might have testified about their relationship, that he was living with them and his relationship with

their children. But I'm not – I'm not 100 percent sure about this. And this – he was working for Nick, his brother Nick. And I don't know if that came from Nick or who that came from, but during that period of time he was working with them.

Q That – he was helpful around the house during that period of time?

A Right.

Q Did the laundry, is that a theme that came out?

A (Witness nods head.)

Q Do you remember that?

A I do remember that. I don't know if she was able to say that during her testimony, but I remember that we talked about that. So if this came out –

Q What I'm wondering is given that the testimony was related to some very discreet areas during a very confined period of time, how much time did it take you to prepare these witnesses for the testimony? Did you spend an hour with each one, would [74] you spend a few minute [sic] with each one, do you recall? Give us a flavor for how long it took to get them into the state of readiness.

A I would say hours.

Q You'll recall during the – during the guilt phase there was a jury note related to a question of, is there an accomplice in this case or – withdrawn.

There was a jury note that said to the effect, can we convict Mr. Rompilla of first degree murder as an accomplice? Do you remember seeing that note?

A I remember there was a note about an accomplice, yes.

Q And there was a somewhat controversial response from your view that the Court gave?

A Yes.

Q Now, do you recall whether there was evidence in the record in this case as well as police reports that arguably tend to show the presence of a person in addition to Mr. Rompilla at the scene of the crime?

A There was something that developed during the course of the trial that enabled us to argue that.

Q Argue that when, during the guilt or the penalty phase?

A Both.

[75] Q Well, correct me if I am wrong, you didn't argue that at any time, did you?

A Yes, we did.

Q When did you argue that?

A It was argued during the closing and guilt phase and also touched upon during my closing.

Q Maybe I misstated my question. Not that there was someone other than Mr. Rompilla or that it was Mr. Rompilla and another person at the same time. In other words, that he had an accomplice, you didn't argue he had an accomplice that would have gotten you relief on first degree, right?

A Right.

Q So you may have argued someone else was there, but you never argued that Mr. Rompilla might have done it with someone else obviously?

A I think there were some subtleties there that could have been drawn, but this was discussed between Fred and I on how to approach that and what was the best strategy. Because I think it's – it was a touchy area and could have – could have either been helpful or very detrimental to the case.

Q Sure. And just so the record is clear on this, what's touchy, of course, is that you don't want the jury to think there was an accomplice to [76] Mr. Rompilla, because that doesn't get you out from under anything?

A Right.

Q He still would have been convicted of first degree?

A Right.

Q So you were still constructing the plan for the argument?

A Correct.

Q None of those applied during the penalty phase. They already convicted him, so you don't have to worry about him getting convicted again.

A I would have to say yes, that your concern in the penalty phase – our concern in the penalty phase, one of them, is that you don't – this jury has just come back with a verdict of first degree murder. And obviously they didn't buy the argument and they didn't believe it. And so you want the jury to – you want to maintain some credibility

with the jury and not have them shut off your argument by continuing on a line that has proven not effective.

Q Correct me if I'm wrong, didn't each of your penalty phase witnesses express their feeling that Mr. Rompilla didn't do it, he was wrongly convicted?

A Yes, absolutely.

[77] Q And you knew they were going to say that ahead of time, you prepared them?

A Absolutely.

Q You didn't tell them, oh, please don't say that, that will turn the jury off and risk – increase the chances of death penalty even more.

A No.

Q So obviously you didn't feel that it was making a suggestion to the jury that was perhaps somewhat contradictory, to what they just decided. You didn't decide categorically that was something that you couldn't and should not do?

A We felt that the jury could accept from family members that they believe and support and love the defendant and therefore of course they are going to believe in him.

Q Okay. And so the answer is that you didn't feel that there was some blanket prohibition on arguing or presenting evidence to the jury that maybe there's some doubt about whether he did it or not?

A That's right. And I argued that.

Q Okay. I guess the point is that's contradictory with what the jury had just decided?

A It's not contradictory to say that a jury may have some doubt in their mind and that the evidence [78] would show why there had to be some doubt, like the lack of eyewitnesses, the hair and fiber that cannot be matched to Mr. Rompilla. As you know, doubt and reasonable doubt are different.

Q All right. It's not a trick question.

A I understand.

Q My point is simply that you had stated earlier that you were reluctant to argue an accomplice in the penalty phase, because you'd be asking a jury to shift gears. And you were concerned about credibility issues, correct?

A Yes.

Q My only point though is that same concern is not a blanket concern and didn't prevent from you arguing something else that was contradictory to what the jury had just decided?

A Maybe you're not understanding what I'm saying. What I'm saying is that to stand up and tell a jury that they have to have some doubt that may cause them to pause before rendering a verdict of death is different than standing up and telling a jury he is innocent and therefore you cannot give him a sentence of death.

Q Now, would you agree under that contract that you just laid out that one could argue by – withdrawn.

[79] Would you agree that one could argue to the jury under those circumstances that not only is there a residual

doubt about guilt, there's a residual doubt about whether or not Mr. Rompilla acted alone?

A Yes.

Q And, of course, whether or not Mr. Rompilla acted alone, what significance would it be on the penalty if Mr. Rompilla acted alone or acted with another?

A Whether or not the jury could find that his role was a minor one.

MR. WISEMAN: If I may just have a moment, Your Honor.

THE COURT: Yes.

Q Now, the Commonwealth's answer to this petition, paragraph number 47, states, quote, to quickly shift gears, after the jury found Mr. Rompilla guilty and argued the accomplice situation would have destroyed the credibility of trial counsel, unquote. Is that sort of the feeling you just expressed that you may have?

MS. PARADIS: Objection, Your Honor. She's a witness – she is not a witness for the Commonwealth at this point. She's a witness for the [80] defense at this point. The perspective in an answer certainly isn't controlling on how she thinks. So I'm objecting to it. It's argumentative.

MR. WISEMAN: Your Honor, if I can just ask one question connecting to it and perhaps that will answer the objection.

THE COURT: All right.

Q You used the word credibility?

A Yes.

Q And Mr. McIntyre, who wrote this pleading, used the word credibility. Is that coincidence, or is that –

A Yes. I can tell you that I have not reviewed his answer.

Q That was my question. Okay. Well, not only didn't you review it, you didn't have any part in its formulation?

A I did not.

Q All right. So you don't have any disagreement then with the fact that there was evidence in this case that one could reasonably argue to a jury that there were two people, Mr. Rompilla and another at the scene of this crime perhaps who committed the crime?

MS. PARADIS: Objection, Your [81] Honor. The record will speak for itself. That's a conclusion that this Court must make, not Ms. Dantos.

MR. WISEMAN: Counsel's decisions in trial are based upon evidence. Her decisions that she may or may not have made obviously are influenced by that. I have a right to know what she was thinking.

THE COURT: I'll permit it.

A I think that you could argue that. But again Mr. Rompilla, throughout our discussions with him, maintained his innocence. And there was never any discussion with Mr. Rompilla that that was a possibility or that that ever happened. I would agree with you that you could argue that.

Q In this case?

A That you could argue the presence of another individual.

Q Now, when you were a defense lawyer, did you ever present inconsistent defenses to a jury?

A Ever? I mean if you're asking me for my philosophy on that, I don't necessarily agree with that. I don't think that that's a position of strength for a defense counsel to come from. I don't recollect whether I've ever done that.

Q Let me ask you this, so that a criminal defendant has the right to –

[82] A Yes.

Q – to testify in a case, and that's a right that a criminal defendant can exercise regardless of what counsel thinks, isn't that right?

A Yes.

Q All the other calls in the case will obviously get your client's input, but are really your calls, the co-counsel's calls?

A Yes.

Q So you could have said, listen, Ron, I know you don't like what we have to do, but if you thought it was appropriate to do, you would have done it regardless of what Mr. Rompilla thought about it?

A Yes, we could have done that.

Q So the fact that Mr. Rompilla had maintained that he didn't do it really didn't and shouldn't have factored

into whether or not you decided to argue that to the jury in the penalty phase?

MS. PARADIS: Objection. It's leading. Argumentative. This is his witness, Your Honor. I know I have not been objecting and it's been going on, and at this point I'm objecting.

MR. WISEMAN: Your Honor, these aren't leading questions. This is – obviously she is a qualified expert, professional witness giving [83] testimony on her thought process. We could be here a week and a half with what did you do next. Obviously I have to direct her to the areas I'm concerned with.

THE COURT: It's leading though.

MS. PARADIS: It's also argumentative. I believe this was argumentative.

THE COURT: I don't think it was. Restate the question and see if you can –

Q Did the fact or did not the fact that Mr. Rompilla maintained that he did not commit this crime influence you in your decision as to whether or not to argue an accomplice in the penalty phase?

A I'd have to say that in the penalty phase my concern was with doing whatever I could to save his life. So my focus was not so much on Mr. Rompilla as he didn't want me to put on my witnesses, but rather in trying to save his life.

Q I take it from that answer then his views on that discreet issue were not controlling under the same?

A Yes.

Q Did you ever have a discussion that you can recall making about whether to argue that to the jury?

A Yes.

Q Did you make that decision sometime before [84] the jury came out in the guilt phase, or did you make it once that jury note came out and the time that you presented the penalty phase?

A I believe subsequent to the note. Actually I'd have to say after the cross-examination done by Attorney Charles on the FBI witness that elicited the testimony that allowed that argument.

Q Right. So there was a number of facts that came out of that evidence that the testimony would tend to support a view of the evidence and the reasonableness of the evidence that there was an accomplice, that there was another person?

A Another person. Fair enough.

Q Just so the record is clear, I think maybe we ought to just briefly discuss some of those pieces of evidence. Correct me if I'm wrong, or, you know, tell me if this comports with your recollection, no evidence of Mr. Rompilla's hair or fibers from his clothing were found on the victim?

A That's correct.

Q That was important because?

A Because –

Q Go ahead.

A Because there were hair and fibers, and they were not found to be those of Mr. Rompilla.

[85] Q And there was a fierce struggle in this case?

A There was a struggle, that's correct.

Q The reason the FBI was called in was to state whether any hair and fiber would be dislodged?

A Yes, sir.

Q Similarly, the victim's hair was not found on Mr. Rompilla when he was arrested or on his clothing?

A I believe that is correct.

Q Fibers belonging to the victim were not found on Mr. Rompilla, is this correct?

A I believe that's correct.

Q Do you also recall whether or not the sample recovered from one of the alleged weapons in this case did not contain Mr. Rompilla's blood?

A I don't recall.

Q Do you recall a fingerprint?

A Oh, yes.

Q There was a fingerprint?

A Yes.

Q Referring to the transcript of the testimony of October 25th, 1988, page 125 being the question that was asked of the witness, at that time, could you determine whether or not that blood was consistent with the blood of the victim, James Scanlon? Answer, yes, the blood was

consistent with Mr. Scanlon's blood. I [86] included Mr. Rompilla.

A Was this on the knife?

Q I was just going to say the questions before that, but I don't want to read the whole transcript to you. Middle of the page. Question – I'm not going to go through them all specifically, but you asked to examine Commonwealth Exhibit 6A and B. Answer, right. Question, which is a knife, two sections of the knife?

Answer, 6A and B are two sections, two pieces of the knife blade. I was asked to check them for the presence of blood, and I did. Question, did you find human blood on that? Answer, yes, at certain parts of the blade I found human blood, which I was able to also prove further than human. That's a typo. Says further than human.

Question, and could you determine whether or not the blood was consistent with the blood of victim James Scanlon? Answer, yes. The blood was consist [sic] at the present time with Mr. Scanlon's blood. I excluded Mr. Rompilla.

A Okay.

Q So you have no quarrel then that the blood – the knife did not have Mr. Rompilla's blood?

A Right.

Q That was another fact that continued to show [87] there may have been another person present?

MS. PARADIS: Objection. The only blood found on the knife which is what you expect was Mr. Scanlon's. The fact that another person's wasn't found on it isn't indicative of anything.

THE COURT: Yes, but I thought he was asking Ms. Dantos to answer that question.

MS. PARADIS: Thank you, Your Honor.

THE COURT: You can answer.

A I don't think so.

Q You disagree with what I said?

A Yes.

Q Okay. Fair enough. Fair enough. Hair recovered from the hand of Mr. Scanlon belonged either to Mr. Scanlon or Mr. Rompilla, do you remember that?

A Yes.

Q Do you think that continued to show there may have been another person in addition to Mr. Rompilla?

A That there was another person.

Q Okay. Well, again, I don't mean to argue with you about it, but we're in the penalty phase now theoretically and say analytically we're in the penalty phase, the jury has already decided Mr. Rompilla is guilty. So for purposes of these questions let us [88] assume that, and I'm asking you for these things, continued to show there was someone else present.

This last fact about the hair tends to show the presence of another person?

A Yes.

Q Okay. Similarly, blood recovered from the floor tiles or the [sic] in the bar, some of the blood recovered

from the tiles in the bar was not consistent with Mr. Rompilla's blood?

A I believe it was Mr. Scanlon's blood.

Q Not consistent with either. Okay. Would that tend to show another person possibly there?

A Arguably. I believe there was an explanation given at trial, but arguably.

Q There's different explanations but arguably?

A Yes.

Q A footprint on the tile floor of the bar did not match the shoes. One did arguably. And one did not match the shoes of Mr. Rompilla. Would you agree that that would tend to show the presence of another person?

A Arguably.

Q Now, aside from the testimony of trial, there were a number of police reports which I assume you got discovery in this case?

[89] A Yes.

Q There was a police report of February of 1988 of an interview with David – excuse me, James David Koch, Junior in which he told the police that he was approached on two occasions by Mr. Rompilla to try to enlist him to rob the bar. Do you remember that police report?

A No.

Q Do you quarrel with what I just told you?

A No, I don't quarrel with you.

Q Assuming that's the case, that it's in the police reports, would the fact that Mr. Rompilla – there was evidence available to you that Mr. Rompilla tried to get someone to help him do this, would that have been evidence that there may have been someone else there with him again for purposes of arguing the penalty phase?

A Someone might argue that.

Q There's another police report taken on January 20th, 1988, an interview with the victim's son, Timothy Scanlon, with Mr. Timothy Scanlon saying Rompilla did it, they've been working this place for a while.

MR. WISEMAN: Excuse me, Your Honor, I'm just reading the quote.

[90] Q The fuckers, plural, lit him on fire. Obviously this would tend to show the mind of the victim's son, that Mr. Rompilla did not act alone?

A I suppose you could read it that way, yes.

Q In another police report, January 20th, 1988, an interview with Kevin D. Schaller, S-C-H-A-L-L-E-R, Mr. Schaller purportedly told the police or let me read the quote the police officer wrote down. Mr. Schaller stated to me on January 20th at approximately 0830 hours he overheard Ronald Rompilla talking to another person at Welty's Bar.

Goes on to describe the person. Mr. Rompilla told this person that we just came from there, meaning the Cozy Corner, where they had just left there. He, Rompilla, told this person that he was sitting next to that, you know, they replaced a steel door on there. Now maybe we can go back later tonight.

Does that quote from the police report also tend to show that Mr. Rompilla may have had an accomplice, again for purposes of the penalty phase argument?

A Or was looking to enlist someone. It could yes.

Q Well, again, taking in all the forensic [91] evidence, attempts to enlist someone who strongly corroborates the forensics that there was another person present, correct?

A It could, yes.

Q Another police report of January 14th, '88 –

MS. PARADIS: Your Honor, I'm sorry to keep interjecting. I have to object on relevance. What we're working with is what the record said and what came out at trial and Ms. Dantos's conduct relevant to what came out at trial is only what's relevant, not whether or not they wanted to bring in witnesses to say that Ron Rompilla asked them to go rob the bar with him.

This makes no sense. These are witnesses that weren't called at trial who would have done nothing I would think to further the defense case. But certainly I don't think that's the issue. So what are we looking at is the time of trial and what Ms. Dantos did at the penalty phase, what came out at the trial.

So for that reason I'm objecting on relevance grounds. These are all police report notations that they may or may not have read in the post-conviction proceeding where a petitioner claims he's denied the sixth amendment to effective assistance [92] of counsel. It is almost always by its nature by definition an extraordinary exploration.

For example, why didn't counsel call the all [sic] witnesses? That's obviously not of record. That's something outside of record. It's wholly relevant in these proceedings and any post-conviction proceedings.

THE COURT: And here it's why didn't the defense team call the people who you've indicated.

MR. WISEMAN: Right. Were they aware of the existence of this information and what was the thought process.

THE COURT: Overruled. I'll permit it for this purpose.

Q The report of January 14th, '88 states that the detective interviewed a friend of Rompilla who overheard Rompilla talking with another and Rompilla said to the friend, we just came from there. We may go back tonight that steel door wouldn't beat me out. Again, does that tend to show that he may have acted with another, is that right?

A It could.

Q I can tell from the faces that, not to be that disparaging, that you obviously don't agree with this [93] as a strategy or as a decision?

A That's correct.

Q Or decision to have made?

A Right.

Q I guess my question then is, you have all this information at your disposal, you had these police reports, obviously you had the forensics, and you didn't use this

information. And I guess I'm just wondering why didn't you use the information. How would it have hurt in the penalty phase to have presented these theories?

A Well, I suppose that the strategy was the following: That it would not be helpful in asking a jury to spare a man's life and to show compassion and mercy to further show them plotting and planning and attempts to enlist assistance prior to the act.

And we felt that those issues had to be essentially argued. And that in this case if, this jury were to come back with a verdict of life, that it would be based on mercy.

Q Now, a lot of what I just went through with you was before the jury called the forensic evidence, right?

A The forensic evidence, yes.

Q You didn't argue absolutely or otherwise I [94] mean in your penalty phase summation that mercy ought to be dispensed because Mr. Rompilla played a lesser role, he never made that argument.

A I argued to the jury that they would never know what happened on that night, and that they had to have some doubts based on not knowing whose hairs those were in the victim's hands. So, yes, that was argued.

Q Was that not a part of your residual doubt argument about guilt which dovetailed with what the family testified to that he didn't do it. Are you saying that you specifically argued that in regards to the accomplice theory if you were cognitively aware of an accomplice and set out to argue that?

A I was cognitively aware of trying to reinforce to the jury that there may have been another person present, yes.

MR. WISEMAN: Your Honor, I don't know what the Court's schedule is. We were handed today by Mr. Charles a large 14 page, single spaced letter that I believe Ms. Dantos and Mr. Charles wrote to Mr. Rompilla just before the trial. It's a plea letter. I'm going to have not a whole lot more with Ms. Dantos, but I would like the time to review it before I question her about it.

THE COURT: All right. We're just [95] at about the lunch hour, and I do have a luncheon meeting. Why don't we recess at this point then. That will give you the opportunity to do that. We should revisit the scheduling. I don't know if Mr. Nelthropp is still is out there or where he is.

MR. WISEMAN: Yes.

THE COURT: I told Mr. Charles I would send him a note saying he didn't have to come in at 11:30 but at 1:30 but if you want –

MR. WISEMAN: My preference would be to have Mr. Nelthropp available shortly after we reconvene. I would hate to see Mr. Charles spend his afternoon in the hall or having him on call for later in the day, although I'm not sure when we'll get to him.

THE COURT: I don't know what they will need him for.

MR. WISEMAN: He was the appellate lawyer.

THE COURT: Would you anticipate it being lengthy?

MR. WISEMAN: He'll be awhile as well, yeah.

THE COURT: All right. Then if we could do this, if you could contact Mr. Charles and [96] have him come back at say 3:00, that should do it I would think.

MR. WISEMAN: Okay. Thank you.

THE COURT: Very good. All right. We'll be in recess until 1:30.

* * *

(Whereupon, a recess was taken.)

THE COURT: All right. Ms. Dantos.

MR. WISEMAN: Your Honor, if I may, the custodian from the school board is here from the hospital. I thought maybe if we could just I mean put them on now, put them on quickly and get them out of here.

THE COURT: Why don't we do that. That's fine.

* * *

RALPH TODD, having been duly sworn, was examined and testified as follows:

* * *

DIRECT EXAMINATION

BY MR. WISEMAN:

Q Please state your full name, sir.

A Ralph Todd.

Q And by whom are you employed?

[97] A The Allentown School District.

Q And are you reporting today in response to a subpoena?

A Yes.

Q What's your role at the school board?

A My title is director of instructional support services, which also manages the records of students that have been in special education.

Q So you're the custodian of record?

A Yes, that's correct.

Q Did you bring records in response to the subpoena?

A Yes, I did.

Q Could you hand them to me?

THE COURT: Are those the originals, or is this a copy?

THE WITNESS: Those are copies.

* * *

(Whereupon, Defendant's Exhibit Number 8, was marked for identification.)

MR. WISEMAN: Your Honor, I have taken the small pile of documents, and the reporter has marked them as Exhibit 8.

THE COURT: D-8?

MR. WISEMAN: That's right.

[98] Q Are those documents that you received in regard to Ronald Rompilla?

A Yes, they are.

Q And are there any other documents in the school board that you're aware of related to Mr. Rompilla, or is this his full file?

A My understanding is this is his full file.

Q Are those documents kept in the regular course of business?

A Yes.

Q And are the people who make entries in documents under duty to do so?

A Yes.

Q And are they, to your knowledge, authentic copies of the file of Mr. Rompilla's school board file?

A Yes.

MR. WISEMAN: Your Honor, at this time I would offer the previously marked school records of 4 and 5. My suggestion would be to make Exhibit 8 a substitute exhibit for 4 and 5.

THE COURT: All right. Would you like to cross-examine this witness?

MS. PARADIS: Just briefly, Your Honor.

* * *

[99] CROSS-EXAMINATION

BY MS. PARADIS:

Q Sir, I'm sorry. I didn't hear your name.

A Ralph Todd.

Q Mr. Todd, how long have you been employed with the school district?

A Twenty-six years.

Q You would not have been in employment at the time these records were kept, is that correct?

A No.

Q So you don't know whether or not the persons who entered the information – you didn't supervise them, you don't know their sources or anything like that, is that correct?

A That's correct.

Q Do you have the record?

A Yes, I do.

Q May I see it, please? Where are these records kept?

A The records, the top paper there, the post index record is kept at William Allen High School.

Q Where?

A William Allen High School or all students who attended there or were going to be attending there.

Q Kept in paper form?

[100] A That's correct.

Q Not microfilm?

A They are microfiche.

Q Microfiche?

A Yes.

Q So these are pulled from the microfiche file?

A That's correct. The same with the other records that are with the psychologicals. They were pulled from microfiche and housed in the administration building.

Q There are some things in your record here called the WISC record form?

A Yes.

Q You pulled them from the microfiche as well?

A That's correct.

MS. PARADIS: I don't have copies of these. May I have an opportunity to review them?

MR. WISEMAN: There were a couple pages that we didn't get in the initial production that the gentleman has brought.

Q Again, these would have all been on microfiche?

A That's correct.

MS. PARADIS: With the Court's indulgence.

[101] Q Do you have more up there that isn't – oh, I'm sorry. There seems to be more in this packet. Do you have something called a pupil's health record?

A I don't have that with me, no.

Q You didn't bring that with you?

A No.

Q When you apparently – someone from your school and maybe it was you or – excuse me, from the district had pulled copies of this recently?

A Yes.

Q Was that you?

A The WISC reports were pulled by me, my secretary.

Q The WISC records?

A That is correct. The other reports were pulled from the attendance/guidance office at the time of the request.

Q Do you know when that was?

A I believe the date was March – the beginning of March, March 25th sounds –

Q But you don't have something called a pupil's health visit or –

A No, I do not.

Q With health room visits, things of that nature?

[102] A I do not.

MS. PARADIS: Your Honor, I have no objection.

THE COURT: All right. Then it is admitted. We thank you, Mr. Todd, for coming in. Sorry to have brought you in here, but it happens. Thank you very much.

MR. WISEMAN: I'll get the next custodian, Your Honor.

THE COURT: All right.

* * *

BERNADETTE DeJOSEPH, having been duly sworn, was examined and testified as follows:

* * *

DIRECT EXAMINATION

BY MR. WISEMAN:

Q Can you tell the Court your name.

A Bernadette DeJoseph.

Q By whom are you employed?

A Employed by Sacred Heart Hospital.

Q What's your position at the hospital?

A I am the outpatient supervisor for records.

Q Did you respond to a subpoena today served by my office?

A Yes, I did.

[103] Q And did you bring anything with you in response to the subpoena?

A Yes. I brought a copy of the records.

Q Records of what?

A Of our outpatient records or emergency room record.

Q That would be related to Ronald Rompilla?

A Yes, it is.

MR. WISEMAN: Could we have this marked?

* * *

(Whereupon, Defendant Exhibit Number 9, was marked for identification.)

* * *

(Whereupon, Defendant's Exhibit Number 9, was marked for identification.)

MR. WISEMAN: Your Honor, the small stack of documents has been marked collectively as Exhibit 9.

Q Could you look at Exhibit 9 and tell me if that is the full record from your hospital of Ronald Rompilla?

A These are all the records that we have on Ronald Rompilla, yes.

Q And are those records kept in the regular [104] course of hospital's business?

A Yes, they are.

Q And are the entries made on those records made by people who have a duty to make those records?

A Yes, they are.

MR. WISEMAN: I would offer the exhibits, Your Honor, as a substitute exhibit for the previously marked Exhibit 6.

THE COURT: Would you like to cross-examine now?

MS. PARADIS: May I just see the record?

* * *

CROSS-EXAMINATION

BY MS. PARADIS:

Q I assume you haven't read these records, is that correct?

A No, I have not read them.

Q So you wouldn't be able to help us on any of this writing?

A No.

Q In fact, you weren't even employed in the hospital back in 1950 I take it?

A That's correct, I wasn't employed at that time.

[105] Q How are these records kept, on microfilm?

A Those are microfiche as well.

Q You had to retrieve the microfiche and make copies?

A No.

Q So there isn't a paper copy existing anymore, is this correct?

A That's correct.

MS. PARADIS: I have no objection.

THE COURT: All right. Then it's admitted. And thank you for coming in, appreciate it.

MR. WISEMAN: That's it for the custodians. Ready for Ms. Dantos.

THE COURT: All right. Ms. Dantos.

* * *

DIRECT EXAMINATION CONTINUED

BY MR. WISEMAN:

Q Ms. Dantos, we discussed this morning the question of the reading of the prior rape victim's testimony in the transcript at the penalty phase. You recall that discussion we had?

A Yes.

Q You were obviously against admission of that at the time of the trial proceedings?

[106] A Yes.

Q You argued it shouldn't be read to the jury?

A That's correct.

Q Do you recall the case that was cited by the prosecution at that time in support of their application to be able to read that material to the jury?

A No.

Q If I told you Commonwealth v. Christie, would that refresh your memory?

A No.

Q Are you aware of the case that was decided on October the 18th, 1988, Commonwealth versus Roland?

A No.

Q If I were to tell you that Commonwealth versus Roland – obviously the Court will make its own determination of what it says, but if I would tell you hypothetically that Commonwealth versus Roland says that burglary is inherently a violent crime and it specifically overrules Commonwealth v. Christie, which was the authority relied upon by the prosecution. Would you agree that that authority would have been good for you to have in argument against admission of the transcript?

A Yes.

[107] Q I take it you didn't have it since you aren't familiar with the case?

A Right.

Q Now, in the Commonwealth's answer to this petition at page 25 at paragraph 136, the Commonwealth states although the Roland case was decided one month before Rompilla's trial, it is clear this case had not been disseminated and was unknown to all counsel and the Court at the time of trial. In your professional judgment as a trial lawyer, do you agree with this statement of the district attorney?

A Yes.

Q That it was unavailable?

A That it was unavailable at the time, yes. It was unavailable to us.

Q Unavailable in what sense, you didn't know that?

A Right.

Q Was there anything preventing you from finding out about it?

A I don't know.

Q The Commonwealth's answer suggests that because it was of recent vintage a month before the trial, that somehow you as trial counselor are excused from having known about it. Would you agree with [108] that? I mean, well, would you agree with that characterization?

A I don't know if I would agree with it or not. I would say that we did not know about it.

Q Should have known about it if it was a one-month-old case directly on point to the issue you were arguing, you should have known about it, shouldn't you?

A I don't know that.

Q Was it a strategic decision on your part not to present that authority to the Court?

A No.

Q There's no tactical reason?

A No.

Q I don't want to beat around the bush. You sort of missed the boat on that, is that a fair characterization, a case right on point that was in existence for a month at the time of argument, you should have had that case?

MS. PARADIS: Objection to missed the boat.

THE COURT: Sustained.

Q Do you agree that you should have had the case if it was helpful and on point?

A I agree it would have been nice to have it [109] and probably would have liked to have had it. Obviously clearly we did not have it, sir.

Q Now, this morning we talked somewhat about your discussions with Mr. Rompilla's family at the time of the trial proceedings. I think you said you don't – you didn't ask any specific questions about abuse, is that right?

A What I told you is that I don't have any recollection of specifically asking that question. But we discussed his family dynamics. I asked about anything important or noteworthy about his family, upbringing, and none of that information was forthcoming.

Q Did you have any – do you recall asking specific questions of anybody in the family about head injuries that Mr. Rompilla suffered as a child?

A No.

Q Or as a teenager or young adult?

A No.

Q Do you recall asking the family if he had been in special education classes?

A As I told you this morning, I don't recall specifically asking that question.

Q Do you recall asking the family if the children, different children in the family, were [110] treated differently from one from the other?

A No, I don't recall asking that specific question.

Q Did you ask the family – do you recall asking the family questions in regard to their economic status were they rich, poor, middle class?

A I think we talked about it, but did I ask them how much money their parents made, no.

Q Did you ever ask anybody in the family whether the family ever went without food or were they ever hungry?

A No. I don't believe I asked that question.

Q Did you ask anything in regard to whether the family – well, how many siblings were there, do you recall, in the family?

A No, I don't recall.

Q If I told you nine, seem about right?

A (Witness nods head.)

Q Yes?

A Could be.

Q There's a large family, do you remember that?

A Yes.

Q Do you recall having asked the family whether the children in the family ever lacked necessities, clothing, shelter, things of that nature?

[111] A No, I don't recall asking that specific question, and I don't recall that information being given to me.

Q Do you recall having asked anyone in the family how the parents resolved any problems that they may have had in their lives, did they have family discussions, or did they have fist fights, or did they have something in between? Do you recall asking those kinds of questions?

A I don't recall asking that question, no.

Q Do you recall having asked the family how the parents may have reacted when Ronald was getting in trouble at school or not achieving in school?

A No

Q Did you ask anyone in the family whether Ronald had ever been left back?

A You asked me that this morning, and I told you no.

Q By the way, did you consult any mental health literature prior to your preparation of the penalty phase in this case?

A I believe that I did read some, yes.

Q Do you remember what you read?

A No.

MR. WISEMAN: Bear with me a [112] moment, Your Honor.

Q You've read – did you read the petition cover to cover?

A As I told you, I read parts of it.

Q Did you read the declaration that is next to the exhibit – next in the petition as signed to by Nicholas Rompilla?

A I read the portion a portion of it that was contained within your allegation.

Q If Mr. Nicholas Rompilla had told you at the time of the trial proceedings that the family had a rough – the children of the family had a rough childhood, is that something you would have found useful in preparing the penalty phase?

A A rough childhood is kind of vague, but I would imagine that if there had been some indication of abuse that, yes, I think that would have been –

Q In terms of providing information to your mental health professionals, the fact that Mr. Rompilla's older brother, Nicholas, was at reform school from the age of nine, is that information that you would have found relevant to give to your experts to assess the family dynamic?

A That the defendant's brother was in reform school?

[113] Q Yes. Yes.

A I suppose if I had had that information I might have, yes.

Q Would you have any strategic reason not to give it to the expert?

A No.

Q If Mr. Nicholas Rompilla told you that his father abused and beat his mother, is that information that you would have found useful in preparing the penalty phase?

A Yes.

Q You, of course, would have given it to your experts?

A Yes.

Q If Mr. Rompilla – I'll be referring to Nicholas unless I tell you different, if Mr. Rompilla told you that both his parents were heavy drinkers and had a history of alcohol abuse on both sides of the family, is that information that you would have found useful to have given to your experts?

A Yes.

Q I think we talked about this this morning about – well, withdrawn.

If Mr. Rompilla told you his mother drank when she was pregnant with Ron, is that [114] something you would have thought important and given to your experts?

A Probably.

Q Is Mr. Rompilla's father's physical discipline against the children, beating them with a belt or a broom or his hands, is that information that you would have felt important and provided to your to your experts?

A Had I had it, yes.

Q Now, moving on to the declaration of Darlene Rompilla, do you recall seeing that in the petition as well?

A A portion of it that was contained within your allegation.

Q In that declaration Darlene Rompilla speaks about a cage that the father, the family's father built and put Nicholas and the other older brother but not Ronald Rompilla into, that she was aware of that kind of bizarre treatment of children, caging them for undetermined periods. Is that something that you would have thought important to give to your experts for purposes of preparing a penalty phase?

A Yes.

Q If you had evidence at the time that obviously if Ronald Rompilla hadn't been put in a cage [115] obviously would you have thought this important to explore as well?

A Yes.

Q How about if he observed his brothers in that cage, is that something that would be important for a mental health expert?

A Yes.

MR. WISEMAN: Thank you, ma'am. I have nothing further.

* * *

CROSS-EXAMINATION

BY MS. PARADIS:

Q Ms. Dantos, you testified on direct examination that while Mr. Charles was the lead counsel during the trial, you actively assisted him in preparation for the guilt phase of the trial, is that correct?

A That's correct.

Q You indicated that you did the majority of client contact?

A That's correct.

Q By that I assume you mean that you spent the majority of the time contacting the defendant, Ronald Rompilla?

A That's correct.

[116] Q And would it be fair to say that you established a relationship with him?

A Yes, I did.

Q And how would you characterize the relationship that you established with him?

A I felt like I got to know him. I felt that over the course of the last year from the time that he was incarcerated that we developed a relationship of trust. I think there were times when there were ups and downs when we would tell him or I would tell him things that he didn't want to hear. But by and large I would classify it as a good relationship between attorney and client.

Q Have you had relationships with other clients who you characterize as not good?

A Oh, yeah.

Q In terms of your relationship, there is no question that this was basically a good relationship?

A Yes.

Q You indicated that you established some sort of trust in him. That trust, was that something that was immediately gained on each side?

A I don't think so.

Q And why do you say that?

A Because I think it's important for a client, [117] a defendant who's – especially in Mr. Rompilla's position, of putting basically his life into his lawyer's hands. That he has to be able to determine that his lawyer is, in fact, on his side and is in fact going to fight for him.

Q Are you aware of times when he ever put you to you a test?

A Yes.

Q And when was that?

A Well, I can't tell you how many times because I don't know, but I know specifically shortly before the trial started that he had given us some information that we checked out through our investigator and it turned out not to be truthful. And during a meeting with Attorney Charles and our then investigator, John Whispell and myself over at the prison that he said he had thrown me a curve.

And subsequently Attorney Charles met with Mr. Rompilla and asked me to leave the room, and they had a discussion about that. And I came back in after that.

Q So he admitted to you that he was throwing you a curve?

A Right.

Q And this was in regard to information that [118] your investigator did that uncovered – that was not truthful in terms of what he had told you?

A That's correct.

Q Okay. Now, you indicated that your relationship with Mr. Rompilla was good. How would you characterize the relationship you had with the members of his family?

A It was good.

Q All right. Did they ever let you know that they trusted you or would confide in you and tell you things?

A Yes.

Q How did they let you know?

A Throughout the trial we were – we were very close basically. And when you're in the situation, it's you, your client and his family against everyone, or at least that's the feeling you have. And they remained with us throughout the trial.

And after a day's work we would go downstairs and commiserate together and talk about it. And after the trial, even after the verdict, the family was oddly enough comforting.

Q Comforting to you?

A Yes.

Q Were they the type of family that would [119] provide you information when asked?

A No. As I said earlier, it seemed pretty clear that they didn't feel as though they knew Ron very well,

because there was a distance as a result of his being incarcerated and as a result of their own whatever was going on with them.

Q When you made inquiries into Ron's childhood with them, did you expect that they were not being truthful with you or were not forthcoming in terms of all three?

A Not at all.

Q At any time during the entire year that you were involved with the Rompillas and the defendant, did anyone ever tell you about the abusive childhood that he had?

A No. No.

Q Or alleged, excuse me, the allegedly abusive childhood that he had, did anyone ever tell you that he suffered any kind of head injury as a child?

A No.

Q All right. Did you attempt to find things out about the defendant through other sources?

A Through our experts.

Q They would be your psychiatrists?

A Yes.

[120] Q We've already heard testimony about some three psych – three mental health professionals who were retained by you. You had used Drs. Cooke and Sadoff in the past in your office, is that correct?

A That's correct.

Q They are very highly regarded in their field, is that correct?

A Yes.

Q And usually Dr. Sadoff and Dr. Cooke work with each other, don't they?

A Yes.

Q And, in fact, Dr. Cooke did the battery or testing, MMPI, the intelligence standards, those things?

MR. WISEMAN: Objection, Your Honor, speculation as to what they generally do and don't do.

A It's the speculation as to what they generally do. It is more a question as to whether or not it's a relevancy issue with regard to what they generally did and what they did here.

MR. WISEMAN: Well, certainly that's another – yeah, I agree.

THE COURT: All right. But there might be relevancy.

[121] MR. WISEMAN: I believe I can make this relevant.

THE COURT: I'll permit it. Go ahead.

Q You had used these individuals before, correct?

A Yes.

Q Dr. Cooke is a licensed psychologist, correct?

A Yes.

Q And he usually does a battery of tests?

A (Witness nods head.)

Q And Dr. Sadoff is the doctor who works with him, isn't that correct?

A That's correct.

Q And his function is usually to examine the client and rely on the findings of Dr. Cooke, the raw data?

A That's correct.

Q As interpreted by Dr. Cooke related to Dr. Sadoff?

A That's correct.

Q And in your experience in your office you were aware this is the way they operated?

A Yes.

[122] Q And so you chose to use them again, isn't that correct?

A Yes, we did.

Q Now, in other cases they have usually authored reports for you, isn't that correct?

A When asked.

Q In the public defender's office?

A Yes.

Q You made a strategic decision in this case and that you already testified that that was to not request a report or to tell them not to prepare a report. Would you tell the Court why?

A The information that was obtained from both Dr. Cooke and Dr. Sadoff was of a nature that I thought could be very detrimental to the client to the case. And there

was some – if you don't have the report, then there's no reciprocal discovery issues. So we made a decision after speaking with both of them on the telephone not to have them author a report.

Q Did they tell you what their testing revealed?

A Yes.

Q What did they tell you?

A To the best of my recollection, that there was no – nothing that we could use in terms of [123] mitigation, that there was no mental infirmity, certainly no insanity, that there is nothing, no organic brain damage, and that their findings were that Mr. Rompilla was a sociopath.

Q A sociopath. Okay. Did you feel that someone labeled as a sociopath – did you feel that that characterization would be something that you'd want the death penalty jury to learn of?

A Absolutely not.

Q You indicated also on – excuse me, direct examination that you had enlisted Dr. Gross as well?

A Yes.

Q You did – I assume you enlisted him to get confirmation of what the others had told you?

A Yes.

Q Why did you enlist Dr. Gross?

A We wanted to fully explore the area as we could.

Q If at any time any of these mental health experts had come back to you with any kind of mitigation, mental

health issues that you felt would mitigate him in the eyes of the jury or mitigate his crime in the eyes of the jury, would you have presented that?

A Most definitely.

[24] Q Okay. Now, Mr. Wiseman asked if you had had an opportunity to review the petition that he prepared in this matter?

A Yes.

Q And entered into evidence already are reports of a Dr. Erwin?

A I believe they are already in there.

Q In those reports, Ms. Dantos, Dr. Erwin relays that Mr. Rompilla apparently told her that he experienced blackouts and blacked out and murdered someone, that he committed a rape, and probably blacked out during that time as well, that he had a significant alcohol problem, and that he experienced blackouts. Is that something that you were made aware of at any time by your mental health experts?

A No. To the contrary, their reports were from Mr. Rompilla that he did not suffer any blackouts.

Q You told them that he did not suffer blackouts?

A That's correct.

Q Now, in fact, and this is going to have to go into a matter that's been waived, was Mr. Rompilla able to recount for you in detail what occurred during the time that the crime occurred? Now, his version.

A Yes.

[125] Q Okay. And did he give you a version?

A Yes.

Q Did he ever tell you that he experienced a blackout?

A Never.

Q Did he tell you at that time that he was under the influence of any type of alcohol?

A No.

Q Did you question him about his alcohol consumption on that evening?

A Yes.

Q And did he give you an indication that he was suffering in any way from the effects of alcohol on the early morning hours when this occurred?

A No.

Q Okay. So your information then, what came from your client, the defendant, and there was nothing in what he told you that indicated that he was in a blackout?

A That's correct.

Q And I am always very wary about treading on this area, because it's something that I'm not used to doing. But what did he tell you in terms of his specific conduct during the period of time where he allegedly experienced this blackout – strike that.

[126] He's now alleging apparently that he suffered a blackout during the critical time?

MR. WISEMAN: I object to the characterization. Its Dr. Erwin's opinion he suffered blackouts, nothing in there said Mr. Rompilla said he's suffering blackouts.

THE COURT: I don't read it that way. I don't know that it can be read that way at all. Certainly it can be read two ways. If it can be read that's her opinion as opposed to what was told to her by Mr. Rompilla, I'll permit it.

Q Mr. Rompilla is now saying I experienced a blackout during the critical time when Mr. Scanlon was murdered. Did the defendant, Mr. Rompilla, give you a version of what he was doing during that critical time?

A Yes.

Q Could you tell us what detail he gave you?

A He was always consistent about earlier in the evening having been at a bar. I believe it might have been the Wooden Keg with his brother, that there was an argument between the two of them. That ultimately he went to the Cozy Corner and had a few beers, glasses of beer there, that after leaving the Cozy Corner that when he left, shortly before closing, 2:00 or 10 of 2, that Mr. Scanlon let him out the door, that he had [127] enough money left to buy breakfast, that he went to Dina's Diner, had breakfast, and thereafter spent the rest of the evening with his friend, Butch Loveless.

That somewhere in there there was a telephone call made to his brother's home, and his sister-in-law asked if she should leave the door open. He said no. He spent the night with Butch. That was the first version.

Q And he gave another version?

A Yes.

Q And why – when did he give you that version?

A I don't know.

Q I'm sorry. I don't mean in terms of exact date or time. But did an event trigger a second version?

A Yes.

Q And what event was that?

A After he told us that he was with Butch Loveless he filed a notice of alibi. Our investigator tried to verify that Mr. Rompilla was, in fact, with Butch Loveless. Butch Loveless recanted his earlier statement and indicated that he was so inebriated he didn't know whether or not he was with Mr. Rompilla at all in the early morning hours.

Thereafter Mr. Rompilla advised us [128] that he wanted to go to sleep after he had breakfast, same initial facts of being at the Wooden Keg and at the Cozy Corner, went for breakfast at Dina's Diner, and thereafter he looked for a car to sleep in and that he found a car with an open door and he crawled in and went to sleep.

Q Again, in the second version did he include anything regarding a blackout?

A No.

Q Was this the second and final version that was given to you?

A No.

Q There was another version?

A Yes.

Q And what precipitated that, if you know?

A I believe we were discussing the results of our – we had hired independently an investigator, outside investigator from the public defender's office to assist us with the evidence in the case, specifically the fingerprint on the knife, the footprint in blood inside the bar. And after a discussion with Mr. Rompilla about how we were going to have to deal with these issues at trial, another version was put forth that he went back into the bar sometime after, I don't remember exactly, I mean to [129] Dina's Diner, and thereafter he went back into the bar to do a burglary, that he slipped in the victim's blood, that he was already deceased, and that he slipped in the blood, used something to wipe off himself, a towel, used it to wipe off the blood that got on him and that he left.

Q And, again, during this third version did he indicate any kind of blackout during the critical time?

A No.

Q So it's fair to say that you had no knowledge of any kind of alcoholic problem that you could present to the jury in this case in the mitigation stage, is that correct?

A That's correct.

Q You were not made aware of anything that you thought would be helpful to present to the jury?

A That's correct.

Q Okay. You were asked why or – strike that.

You were asked several questions regarding whether or not you thought of arguing to the jury the major role of the defendant, and you've already testified that you in

your – in the guilt phase, you, the defense team, had argued it was somebody else, it wasn't the defendant. And you even indicated you suggested during your argument to the [130] jury in the death penalty phase that you reminded them of that in a subtle way?

A Right.

Q You did not choose to pursue it as the defendant as a minor player in this, is that correct, as a minor player in the homicide?

A I think that could have been inferred from the argument that there was someone else there. Whether they choose to believe someone else other than the defendant or someone else with the defendant being present, I think we left it open for their interpretation.

Q In terms of strategy, do you feel it would have been a good strategy to do a complete 180 so to speak and invite the jury to say, okay, we said in the guilt phase he didn't do it, but now we are telling you he did do it. Would you – do you feel that would have been a good strategy?

A No.

Q Why did you choose that route? Why did you choose that strategy?

A Given all of the fact and circumstances of this case, given Mr. Rompilla's past, it was our belief that the only way to proceed and the only chance that we had of saving his life was to appeal to their sense [131] of compassion and mercy and to ask them to be better than they found him to be. And to – and you have to remember that the facts of this case were horrible, and they were represented to

the jury again during the penalty phase through Dr. Mihalakis with respect to torture.

And the only avenue that we felt we had was to go after compassion and to show Ronald Rompilla as a human being, as someone who is worth more than just this act, and to bring out all of these other issues about whether or not there was someone else, whether or not he had planned it before and brought in other people. We felt it would further enrage the jury when we were trying to appeal to another side of them.

Q You obviously had to deal with the evidence that had been presented at the penalty phase, and that included testimony regarding his prior rape and burglary, isn't that correct?

A Yes.

Q Was there anything about that particular act that added to your decision not to – not to choose another strategy? Do you understand my question?

A No.

Q Okay. The facts of the rape and burglary came out?

[132] A Yes.

Q Did you feel that another strategy would have happened in light of the fact that the jury had heard facts similar to the incident for which he had been – just been convicted?

A No. In fact, we felt strongly that once they heard the transcript of the direct testimony involving the rape

and burglary, that dealing with the knife again, that that pretty much did it. That's all I can say.

Q Okay. Mr. Wiseman asked you about why you didn't bring in or attempt to introduce those witnesses you had read about or should have read about in a police report regarding the fact that there was possibly another actor. Would you please tell the Court why you didn't bring those people in in the penalty phase?

A I felt that further evidence of any sort of premeditation would – plotting and planning and trying to enlist people certainly would not show Mr. Rompilla to be a minor player, but rather would have the opposite effect.

Q So those witnesses mentioned in the police reports this morning would not have helped in any way to portray Mr. Rompilla as a major player.

[133] A Not in our review of it, no. Not in our review of it, no.

Q Did you feel that you gave Ron's family the opportunity to tell you about him as a person and his growing up and his childhood?

A Definitely.

Q Did it ever come to your attention through them the type of home he allegedly grew up in?

A The picture that we were presented with was that they loved each other, and that they were supportive of each other and that they cared very much about what happened.

Q Did the family in any way offer to you mitigation for him other than what is on the record already in terms

of they love him, they support him, he's got some worth, that kind of thing? Did they ever offer any other evidence that they thought you should consider?

A No.

Q From what point – point is not a good word. Where was the family coming from in this whole thing?

A They were totally behind Ron. They believed in him 100 percent.

Q Did they ever waiver on the fact that they [134] thought he was innocent?

A No.

Q So it's fair to say no one ever tried to offer you an excuse as to why he might have done it?

A No.

Q Now, you indicated that you got to know him over the year. And setting aside anything that you did with the mental health professionals in terms of asking for certain testing, et cetera, was there anything in your contact with him, anything in your conversations with him, anything in your dealings with him that lead you to believe that he suffered any kind of mental retardation?

A No.

Q And again, your experts never told you that he suffered from any kind of mental retardation, is that correct?

A That's correct.

Q If the only significant physical history of the defendant was that at the age of two he had a temperature of 105 degrees and had some diarrhea, do you feel that that would have been evidence that you would have thought the jury found persuasive in explaining why he would do the things he did?

A No.

[135] Q Have you ever had a 105 degree fever?

A Higher.

Q You were asked to look at what – I don't know the exhibit number. I apologize. It's called the initial transfer petition.

A Yes.

THE COURT: That would be D-7.

Q D-7 in that petition. First of all, that petition is not authored by a clerk of the Court of Common Pleas, is it?

A Not that I can tell, no.

Q It appears to come from the Department of Corrections. That would be the state correctional facility?

A Right.

Q These papers are not usually routed to the public defender's office, are they?

A No.

Q And, in fact, they usually do not come to you after you've prosecuted a case or anything or, excuse me, defended a case, is that correct?

A That's correct.

Q Mr. Wiseman asked you about some testing on the MMPI scale and whether if you knew what they meant. Would that have been significant for you to [136] tell the psychiatrist? I just want to point to something there.

MR. WISEMAN: The psychologist?

Q Psychologist as well as psychiatrist. And would you feel that imperative to let them know about that? Would the testing data also including an IQ score of 93, would you have felt that that was something significant in terms of diminished mental capacity?

A No.

Q This IQ score, according to this report, would have been in the mid-70's, correct?

MR. WISEMAN: Is that chronologically or –

MS. PARADIS: The report itself seems to indicate test data summary from the mid-70's, 1975.

MR. WISEMAN: I was just confused. It was as opposed to the year it was written.

Q So you had no evidence from your mental health professionals or from your own involvement with the defendant that he had any way – had any kind of mental impairment, correct?

A That's correct.

[137] Q In fact, you said he was able to lie to you?

A (Witness nods head.)

Q Explain his lies to you, correct?

A Yes.

Q So he wasn't functioning as someone who would act mentally retarded, is that fair to say?

A That's fair.

Q Or who is mentally retarded. Excuse me. The issue regarding the Roland case which Mr. Wiseman referred to, decided October 18th of 1988, when did trial in this case start?

A I believe we started selecting the jury on October 18th.

Q October 18th, the very day that this case came down. So this case down – didn't come down a month before the trial began, but rather the day it began, is that correct?

A If that's the correct date of the case being decided, then that is the date we began jury selection.

Q And you went to death penalty October 31st or November 1st, is that correct?

A Yes, somewhere about there. I believe so.

Q You actually did what the holding enrollment says which is you offered to concede that burglary was a crime of violence, did you not?

[138] A Yes.

Q So you as counsel made a decision to concede what you didn't know had just been decided, is that correct?

A Yes.

Q By the way, did you ever read the advance sheets?

A Yes.

Q The advance sheets?

A Yes.

Q So have you ever seen an advance sheet published the day of, within a week of, or even within two weeks of a case being decided?

A No.

Q Usually the cases in advance sheets are pretty old?

A Yes.

Q Well, that's a relative statement I guess, but –

A Not that current.

Q So there would have been nothing in the advance sheets regarding this issue?

A That's correct.

Q Ms. Dantos, aside from what you did during the death penalty phase of this hearing, were there any [139] other efforts you made as counsel for Mr. Rompilla to spare him the death penalty in terms of preparing for trial, no bargaining, anything of that nature?

A Yes.

Q What were they?

A We went to Mike Moyer, and there had always been – in our discussions with Mr. Moyer it was always really clear that he wanted to pursue the death penalty. But he always left it open, left open the possibility that if

there were a plea or contemplation of a plea from Mr. Rompilla, that he would be spared the death penalty.

We firmed that up prior to trial and spoke with Attorney Moyer, who indicated that he would in fact offer that, life in exchange for a plea to first degree. And when we asked about concurrency on both charges, the robbery and burglary, Mr. Moyer indicated, you know, that you come back and tell me that he's willing to plea and then we will talk about that. But that seemed as though that could happen.

Q And did you relay that to your client?

A Yes.

Q How did you relay that to your client?

A We went over and talked to him about it.

Q All right. Did you ever set – form any kind [140] of statement to him regarding what you had done in a letter?

A Yes.

* * *

(Whereupon, Commonwealth Exhibit Number 1, was marked for identification.)

MS. PARADIS: Ms. Dantos – may I approach the witness?

THE COURT: Certainly.

Q Ms. Dantos, I'd like to show you what's been marked as Commonwealth Exhibit Number 1. Would you please identify that?

A This is the letter that Fred Charles and I prepared and had hand delivered to Mr. Rompilla subsequent to our meeting with him where we outlined what our read on the case was and what the offer to Mr. Rompilla was that was on the table.

Q How many pages is that letter?

A Fourteen.

Q Okay. Do you – what other things did you explain, and you don't have to go into detail, but just topic-wise, what did you explain to Mr. Rompilla in that letter other than the plea offer that you – plea agreement – you use plea offer in that letter?

A We explained in the letter what the law was [141] in terms of the death penalty. We explained in the letter that contrary to Mr. Rompilla's read of the case that it was our opinion that given all the facts and the evidence, that it was likely that he would be convicted of first degree murder, and that if that were to happen, that he faced the overwhelming possibility of receiving the death penalty. And our advice to him was to take the plea.

Q And he rejected that I assume obviously?

A Yes.

Q After the verdict in the first degree murder – or first degree murder came back, at any time in the immediate period after that and before you went into the death penalty phase, did Mr. Rompilla tell you, okay, all right. Fine. I did it, but look this is the reason why. I was in blackout. I really don't remember anything of that nature. Did he ever give you a reason to change your position in front of the jury?

A No.

Q And, again, no family members did either, is that correct?

A No. That's correct.

Q And this is the final area I'd like to go into at this point. And I keep – I referred to your mental health experts before you. You reviewed the [142] report of Dr. Gross, is that correct?

A Yes.

Q Do you have that in front of you up there?

A Yes.

Q All right. And in that report, he indicates that your client denied the charges entirely in the second paragraph, isn't this correct?

A Yes.

Q And he also goes on in the third paragraph to give a narrative that was relayed to him by your client regarding the details of the evening in question or the – and the morning in question, isn't that correct?

A Yes.

Q Okay. In the next paragraph, which would be the beginning of the fourth paragraph, he tells you that your client said that did he not feel that he was intoxicated during that night, isn't that correct?

A Yes.

Q And then further down in the sixth paragraph he indicates that Mr. Rompilla denied drinking heavily or

regularly and does not consider himself an alcoholic, and that he denied any period of blackouts isn't that correct?

A Yes.

Q He also denied any other hard drugs and that [143] he respected his body.

A That's correct.

Q Also there was no history of any psychiatric illness or treatment and that he had denied any head injuries?

A That's correct.

Q He indicated that his childhood was uneventful and that he denied any abuse, physical or sexual, while, growing up?

A That's correct.

Q Dr. Gross indicates that there was no evidence during the interview of any thought disorder or effective illness, is that correct?

A Yes.

Q So is it fair to say that based on your interviews with the defendant, his family, and then the report authored by Dr. Gross, that you had no knowledge, in fact, you had evidence to the contrary of any kind of physical abuse or abuse in the home?

A That's correct.

Q And again the blackouts?

A Yes.

MS. PARADIS: I have no further questions.

THE COURT: Any redirect?

[144] MR. WISEMAN: Yes, Your Honor.

THE WITNESS: I'm sorry. I have a day-care situation, if I could use the phone to let them know I'll be late.

THE COURT: Why don't we take a ten-minute recess at this time.

* * *

(Whereupon, a recess was taken.)

THE COURT: You may take the stand, Ms. Dantos. All right, Mr. Wiseman. You may begin.

MR. WISEMAN: Thank you Your Honor.

Q Ms. Dantos –

THE COURT: I guess I should say you may continue.

MR. WISEMAN: Hopefully we'll finish.

* * *

REDIRECT EXAMINATION

BY MR. WISEMAN:

Q Ms. Dantos, you said you didn't get the exact words he used, but essentially that you weighed nothing to mental health mitigation, you had nothing by way of mental health mitigation to go on?

[145] A That's correct.

Q Did you record the large scar above Mr. Rompilla's left eye?

A No.

Q Are you aware that he has such a scar?

A Yes, I remember a scar.

Q Did you ever tell Dr. Gross, Dr. Gross, Mr. Rompilla has a four-inch long scar over his left eye?

A I don't believe I would have. Mr. Gross saw him, but, no, I don't recall.

Q So you were relying on Dr. Gross to make those observations?

A I didn't feel it important to relate that – well, let me back up. Why would a scar be important in this context, a scar on a head?

Q Because if there were a head injury that was reported or a head injury that could cause some kind of trauma.

Now, you're aware that Dr. Gross's report says no head injury?

A Yes, I am.

Q That's inconsistent with any observation of Mr. Rompilla, a rather large scar over his left eye?

MS. PARADIS: Objection.

[146] THE COURT: Sustained.

MR. WISEMAN: This witness is saying she notices the scar. Dr. Gross says no head injury. I'm asking if she thinks that's inconsistent with Dr. Gross.

Q Now, your attention is directed to the scar. Do you think Dr. Gross was wrong when he reports in his report no head injury, that Mr. Rompilla had no head injury?

MS. PARADIS: Again, objection.

THE COURT: Is a cut, a head injury that would lead someone to conclude something else, something happened to the brain or for instance I mean aren't we talking about maybe two different things?

Q Well, did you ever say to Ronald Rompilla how did you get that big cut over your left eye?

A I don't think so.

Q Did you ever ask him about the cut over his right eye?

A I don't think so.

MR. WISEMAN: I called it a cut. I'm using the Court's terminology. It's a scar. The record should reflect and obviously, Your Honor, could make its own observations, that the scar over the right [147] eye is about three inches in length, the scar over the left eye looks to be about four inches going up towards the scalp.

Q So you never asked him how he got those scars?

A I don't remember asking him that.

Q Do you know if Dr. Gross asked him?

A I don't know what Dr. Gross asked him.

Q You weren't at the interview with Dr. Gross?

A That's correct.

Q You weren't at the interview with other mental health people?

A Right.

Q By the way, you mentioned the beta IQ being in the 90's, is that right?

A I noticed it on the report.

Q On this exhibit?

A Yeah.

Q Are you aware of any difference of how that test is or how people perform on that test as opposed to the WISC test?

A No.

Q So you don't really know if that's of significant difference?

A No.

[148] Q Did you ever ask the family of Mr. Rompilla how did he get those scars on his head?

A I don't believe so.

Q Now, from your letter, your plea letter, for identification purposes we can call it your plea letter to Mr. Rompilla has a particular slant to it, doesn't it? I mean you and Mr. Charles took a position of recommending a plea?

A That's correct.

Q Was your view of Mr. Rompilla's assessment of the situation one that he had a realistic view of the likely outcome or had an unrealistic view of the likely outcome?

A. We believed it to be unrealistic.

Q Mr. Rompilla told you a lot of things that proved, during the course of your representation, that proved not to be true, right?

A Yes.

Q He would tell you stories, you'd check them out, they weren't quite right? Was it that he was a poor historian?

A There were things he told us that proved to be inaccurate.

Q Well he lied, is that what you're saying?

A (Witness nods head.)

[149] Q Throw a curve as I think the letter refers to it?

A Right.

Q And I think you referred to it in your testimony. Now, how do you know that he didn't throw you a curve when he told you he grew up in a nice household, you don't really know that, do you?

A No. I'd say, no, but that the – that my sense, and we all rely on our own common sense, was that the motivations for telling or throwing curves when you're talking about your criminal case are different than your motivations in telling someone about your upbringing.

Q So if Ronald Rompilla told you I did well in school, you would think he'd have no motivation to lie about that, is that what you're saying?

A There are different motivations.

Q Is it possible that Ronald Rompilla may not have understood the significance of doing well in school as a mitigating factor in a capital case?

A I don't think so.

Q Did you ever define for Ronald Rompilla what it means to do well in school, what it was you were looking for in terms of upbringing and background and school?

[150] A Mr. Rompilla and I were clear that I needed information for the penalty phase. So whether – I can't say that I told him if you did poorly in school that would help our case, but Mr. Rompilla was clear that I was trying to save his life, and that we needed information, and that's what I was looking for.

Q Understood. My question is, did you ever explain to him the significance of particular information related to his background, or did you just say to him, how did you do in school, Ron? And he said, I did fine. And you left it at that. Is that the way the conversation went?

A I don't think so, no.

Q Well, did you go check the school records?

A No.

Q No, you didn't. So essentially you said, Ron, how did you do in school? He said, I did all right, I passed. Is that essentially what he told you?

A That there was nothing unusual about it.

Q And you didn't bother to go check that out? You checked it out when he told you a story about the guilt phase, didn't you?

A Yes.

Q But you didn't check it out when he told you what was essentially now a story about mitigation?

[151] A Right.

Q What did Dr. Cooke or Dr. Sadoff or Dr. Gross tell you about the brain damage testing they did that you think they did?

A I don't recall any specifics about what tests were performed, but that there was no evidence of any brain injury, brain damage.

Q Do you know what brain damage testing they may have done?

A No.

Q Do you recall what brain damage testing you asked for?

A No.

Q And I take it from our prior discussion you didn't give them any background about his school records?

A Correct.

Q You didn't, by the way, expect Dr. Gross or Dr. Cooke or Dr. Sadoff to go to the Board of Education and get the record themselves, would you?

A Probably not.

Q That would be the attorney or investigator's job, right?

A Yes.

Q When they told you, Dr. Cooke and Dr. Sadoff [152] told you that they thought Mr. Rompilla was a sociopath, did you ever ask them what can cause sociopathic behavior?

A I don't recall that conversation about it, no.

Q Are you aware that sociopathic behavior can be caused by a variety of mental illness?

A I would assume so.

Q So, for example, if you were a schizophrenic you might not set a fire but if you were a sociopath you might set a fire, right, as an example?

A I'm not qualified to answer that.

Q Fair enough. Are you aware of a history of sociopathic behavior in child abuse, not in Mr. Rompilla's case but generally, clinically that there is a correlation there?

A No.

Q Abused children often act out when they get older. You kick a dog, it gets mean. Is this a dynamic you're aware of?

A Yes.

Q Were you aware of it then?

A I would assume so.

Q Did you explore that in view of the – were you aware of the fact – did you explore with the [153] doctors what it meant that he was a sociopath?

A They explained things to us that we relied on. We relied on their expertise. I'm not qualified to determine what causes it or what manifestations there may be as a result of it.

MR. WISEMAN: Okay. I have nothing further.

THE COURT: Any recross?

MS. PARADIS: No further questions.

THE COURT: Thank you, Ms. Dantos. All right. Mr. Wiseman, I saw Mr. Nelthropp.

MR. WISEMAN: If I could just have a moment to shuffle my papers. Actually, Your Honor, while we're waiting for that, just one housekeeping matter, the transfer petition that's been marked as an exhibit, I don't want to run into a problem later, but there's some question as to its origins and where it came from. Could, Your Honor, direct the Clerk of Courts to produce the microfiche film or verify some way that it's in there?

My recollection is it's a rather large microfiche file and may take them some time to print out. I wanted the Court to be aware we don't have to serve a subpoena downstairs, but I'd like the [154] clerk to come up and clarify that was in the file.

THE COURT: All right. Maybe is that something, Ms. Paradis, that do you have some question about or not?

MS. PARADIS: It says the Clerk of Court copy on it. I don't know which file this actually came from, that is my problem. It's clocked in the criminal – the juvenile division I noticed, which seems out of odds, because this is a state correctional institution summary, something that we have never been privy to.

MR. WISEMAN: Well, Judge, it's there. Have it brought up, and we don't have to banter.

THE COURT: All right. We'll deal with it. I'll have my law clerk deal with that issue for you, Mr. Wiseman.

MR. WISEMAN: I appreciate that.

MR. NOLAS: I was just informed Mr. Nelthropp went to the seventh floor to get a cup of coffee. Do you want to take five minutes?

THE COURT: Would you run up.

MS. PARADIS: Your Honor, another housekeeping matter. There are portions of the school record that was admitted that we don't have copies of, [155] and I would just like to make copies of those pages.

THE COURT: Certainly. If you could give them to her to do both issues she'll deal with this.

MR. WISEMAN: Perhaps we can make use of this time.

* * *

(Whereupon, an off-the-record discussion took place.)

THE COURT: We had a short, off-the-record discussion concerning the evidence, taking of evidence in

this case other than during open court, that is by deposition of Dr. Gross, which is apparently now set for 6:00 on Monday.

MS. PARADIS: I don't know that.

MR. WISEMAN: Tentatively set.

MS. PARADIS: I haven't discussed this with Mr. McIntyre. Mr. Wiseman did approach me about it after the lunch hour, but Mr. McIntyre is in trial, and I have not discussed it with him. He will be handling the deposition of Dr. Gross.

MR. WISEMAN: I don't think I firmly set that up with Mr. McIntyre. I might have discussed it. I might not have actually discussed it with him because of late breaking stuff with Dr. [156] Gross.

My proposal would be this, Your Honor, that we take, assuming Mr. McIntyre's availability, Dr. Gross's deposition at approximately 6:00 on Monday. The logistics of that is we would need a speaker phone, just a regular phone with a speaker and a court reporter and place to do it.

THE COURT: So you're not going to go to Dr. Gross's office for that you're saying?

MR. WISEMAN: I really didn't talk to him about that. I don't know.

THE COURT: Probably would.

MR. WISEMAN: I can discuss that with him. My concern though is getting a court reporter. I don't want to put the Court to extra expense, and I certainly don't want to incur the costs for getting a private court reporter

for what is part of the proceedings. I don't know what the availability is to get a stenographer.

THE COURT: I'd get a private one. I'd get a private one, because you need it. And you want to get out expedited copy because we want to move this along. So I would call – Ms. Paradis can help you with that. There are a couple of ones that whoever you think would be good and could do it.

[157] MR. WISEMAN: And I guess it is a question of expense at this point.

THE COURT: Well, that's something the county – your request of the county. Okay. Fine. Mr. Gallagher may do that, Ms. Paradis.

MS. PARADIS: Mr. Gallagher, why don't we try him.

MR. WISEMAN: Finally, Dr. Armstrong will actually be here in person during regular business hours for Tuesday afternoon for her deposition. And if there are any witnesses left after we're done tomorrow, I propose putting them on Wednesday.

THE COURT: Right. That's what we'll do. All right. Now, then with regard to those depositions that you've just told me about, there is no need for Mr. Rompilla to be present at those obviously?

MR. WISEMAN: Not from our perspective.

THE COURT: Very fine. All right. Mr. Nelthropp, I think you're on board.

* * *

ALBERT NELTHROPP, ESQUIRE, having been duly sworn, was examined and testified as follows:

[158] MR. WISEMAN: Your Honor, I've marked this collectively as Exhibit Number 10. It's not fastened with a staple, it's got a clip on it, but we can fix it up later.

THE COURT: Actually we have a stapler right here. Mr. Nelthropp, I will do that for you.

* * *

(Whereupon, Defendant's Exhibit Number 10, was marked for identification.)

* * *

DIRECT EXAMINATION

BY MR. WISEMAN:

Q Good afternoon, Mr. Nelthropp.

A Good afternoon.

Q What's your occupation, sir?

A Attorney and conflicts attorney in Lehigh County part time.

Q I didn't hear you.

A Conflicts attorney part time in Lehigh County.

Q Perhaps if you lean into the microphone. It's very hard to hear.

[159] A Okay.

Q How long have you been a lawyer?

A Since 1980.

Q What areas of law do you focus your practice on?

A Well, I was doing mostly criminal law, domestic relations.

Q When you say you were, you still do both?

A Yes, I do.

Q Now, you mentioned that you're conflicts counsel. What does that mean?

A Well, if there's a conflict between the public defender's office and the client they are representing, then they will – the Court will appoint me to represent that client.

Q And what is your arrangement with the county for that representation, your financial arrangement?

A They pay me a salary for the year as a part-time employee.

Q So it's a flat rate salary?

A That's correct.

Q You don't get paid per client?

A No.

Q Now, you know Ronald Rompilla, don't you?

A Yeah. I saw him before in Court.

[160] Q Is this the first time you've seen him?

A No.

Q When else have you seen him?

A When he was being tried the first time.

Q All right. Did you ever represent Mr. Rompilla?

A I was appointed to represent him.

Q At what stage of his case were you appointed to represent him?

A After he was convicted and sentenced then I was given the job to file his appeal.

Q Now, if you look at the first page of the Exhibit 10, there's a letter written by Mr. Rompilla to Mr. Siecer, S-I-E-C-E-R, do you see that?

A Yes.

Q And if you look at the second paragraph you'll see your name is mentioned as well?

A That's correct.

Q What was Mr. Siecer's role in Mr. Rompilla's case?

A Lawyer as well assigned to it. He was conflicts attorney, but when I got the file I basically did the work.

MS. PARADIS: Excuse me. Is this Mr. Sieger that we're talking about?

[161] THE COURT: There is a mistake that we should point out for the record. It's Mr. Sieger. I don't know what it was initially, but Mr. Sieger is spelled I believe S-I-E-G-E-R. And that's who I'm sure he's referring to.

MR. WISEMAN: That's correct.

Q So I guess I'm little confused. Was he formally assigned to represent Mr. Rompilla with you, or were you the one who was formally assigned to represent Mr. Rompilla?

A Well, my understanding was that I was appointed and assigned to represent him. I never asked Mr. Sieger if he was also assigned to do it.

Q So he had no involvement in the actual representation?

A Not that I know of, no, he didn't.

Q Now, could you describe if you would – withdrawn.

Did you ever visit with Mr. Rompilla while you were representing him?

A No, I didn't.

Q Did you ever have occasion to talk with him about the case?

A No, I didn't.

Q Did you ever receive letters from [162] Mr. Rompilla?

A Yes, I did.

Q How would you characterize or describe your relationship with Mr. Rompilla through those letters?

A Well, he'd send me letters and also send me documents and research that he had done, and he would send it to me and ask me to consider it to see if that would be an appropriate issue to bring forward in the appeal.

Q Did he make any demands or you?

A Not really. He sent me things. There was – he sent me a big package of issues that he had written himself. This was very lengthy, and I reviewed it. I attached it to the brief that I submitted to the Supreme Court in case there was any issues that the Supreme Court wanted to look at, issues that he had raised.

Q Was your relationship with Mr. Rompilla a good one?

A I mean it was by correspondence. I didn't have any sort of personal relationship with him.

Q Well, your professional relationship with him by correspondence was a good one or not?

A Well, until the time I filed a brief I don't see that it was a bad relationship. I mean I didn't – [163] it's as many relationships are, many kinds of these type of situations in criminal cases.

Q At the time that you were assigned to represent Mr. Rompilla had you ever done a capital appeal?

A No, I had not.

Q Had you ever done a homicide appeal?

A I don't think so. I'm trying to think maybe with the – like a neglect homicide or traffic case.

Q Not a first degree though?

A No.

Q Had you ever tried a homicide case?

A No, except I had tried – as a prosecutor I tried neglect homicide, but not first degree homicide.

Q By neglect homicide, would that have been a vehicular-type of a homicide?

A It was vehicular homicide.

Q It was?

A More than one.

Q Now, you got this case, and correct me if I'm wrong, post verdict motions had been filed by trial counsel?

A That's correct.

Q And it was your job to then file memorandum in support of that motion?

[164] A That's correct.

Q And you were assigned to the case in 1988, is that right, right after the trial?

A Somewhere after the trial. I can't recall the exact date.

Q Late '88, early '89?

A I'm vague as to the date. I know it was after the trial, sometime after the trial. '88 sounds about right.

Q Do you recall when you filed the memoranda for the post-verdict motion?

A No.

Q Would 1992 sound about right?

A I don't know. I know that I filed – appeal was filed.

Q Do you recall having –

A I couldn't tell unless I saw the document.

Q Okay. Do you recall having some difficulty with this case following the denial of post-verdict motions and the formal imposition of sentence as in regard to notice of appeal.

A Yes, because originally there had been one, which is different from other cases. As soon as the defendant is sentenced, the 30 days begins for the appeal, and unlike the other cases where the [165] post-verdict motions then took place and then the defendant was sentenced and then the appellate process began, in the death penalty phase the appellate process began immediately. So there was – there was a problem in that no one had filed a –

Q Let me just stop you. When you say no one, who else should have filed it other than you? It was your job to file it?

A No, because I thought that had been done. At the time it had to be done before I even took over the case.

Q So you thought that it was done prior to the formal imposition of sentence?

A No. According to the situation that arose, he had 30 days from the date that he was – sentence was imposed, which had been at the time right after his trial and his conviction. He had 30 days, and that had not been done. So that when the Supreme Court informed me there was no appeal pending –

Q So you're saying then that it wasn't your oversight in not filing the notice of appeal, it as prior counsel's oversight?

A I don't know if it was in between. They may have sent it to me thinking it had been done or I would have done it, and I received it from them thinking that [166] it had been or it should have been done, but in any event, the Supreme Court seeing it was a serious case allowed it to go through.

Q So you got notification from the Supreme Court that the appeal had not be [sic] heard except for the automatic aspect of conflict appeal, because notice had been filed late?

A But on agreement with the district attorney's office they agreed that those issues should be heard also.

Q We'll get to that point. I'm just focusing –

A I'm just telling you.

Q The Supreme Court notified you that the case would be heard?

A Yes, sir.

Q And you filed a petition for appeal nunc pro tunc?

A I believe.

Q And in that petition would be the third – starts on the third page of the packet in front of you if you want to look at it on that page, paragraph nine you state, accept full responsibility for the late filing. It was a misunderstanding of the proper procedure to file an appeal in a capital case.

[167] A Yes. I'll accept responsibility. I have no problem accepting responsibility.

Q Okay. I'm just asking. Now, I asked you earlier if Mr. Rompilla was a particularly demanding client, and I think your answer was he was not?

A Not particularly. I mean he wrote letters and he wanted responses.

Q I'm sorry?

A He sent letters and he wanted me to notice him on information.

Q Didn't he ask you for things also?

A He asked me for the transcripts at one point, and I was using the transcripts, I needed them. It was expensive to make a whole new set of transcripts, and I had to – I had to use them for the work that I was doing.

Q Were you working on his case continuously from 1989 until the appeal was filed in 1994?

A Not – I mean not on a daily basis.

Q Were you working on any kind of a regular basis?

A You know, as the schedule – things had to be done, they were done.

Q Why did it take four years to file the post-verdict motions memorandum?

[168] A I believe that I didn't receive any petition or schedule from any – from the Court demanding that anything be done, any memorandum be filed by a specific date. So I did not put the memorandum together, because I did not have a specific deadline to do so. I had – I was doing other work also.

Q All right. Now, the arrangement you have with the county for these conflict cases at that time from 1989 until the file of the appellate brief, what was the average number of cases that you had in any given time?

A I don't know, but I was in court constantly.

Q You were busy?

A Yeah.

Q Would it be fair to say that the more work you did on a case the less financially beneficial it was to you?

A That was not a consideration.

Q I didn't ask if that was the consideration, I asked if that was the case, the more work that you did, flat rate, the less you made per case?

A Well, I had my private practice on the side. So I worked, had that with my private cases, and I did what had to be done with the cases for the county. I did not look at it in terms of how much money per [169] case. I know that I spent a lot of time for the amount of – for the payment that I did receive.

Q Now, your testimony then is that there was no financial consideration in the way you handled Mr. Rompilla's case?

A No.

Q No issue related to how quickly you'd get to it or how much time you'd spend on it?

A No. It was just as other cases went, what had to be done with other cases, the work.

Q Why don't you look at that packet and a letter of April 15th. There's a letter that you wrote to Charles Johns, who is the prothonotary of the Pennsylvania Supreme Court.

MS. PARADIS: Your Honor, at this time I realize I should have asked for an offer of proof. I'd like to interpose an objection at this point. It appears –

MR. WISEMAN: Could we excuse the witness if there's going to be argument?

THE COURT: Well –

MS. PARADIS: It's not really substantive. It's not really substantive. It appears that Mr. Wiseman is examining Mr. Nelthropp as to the manner in which he handled the appeal. The issue is he [170] did or did not raise things of that nature.

My contention, which – well, not my contention. Mr. Wiseman's contention, which was conceded by Mr. McIntyre is, okay, we are not going to argue any waiver issues, we're going to address all the issues you raise here in PCRA court.

So the fact and what we're looking at is what happened down at the trial court level. So whether Mr. Nelthropp raised issues, did a good appeal, didn't do a good appeal, seems to be irrelevant in light of the fact that we're not contending the waiver. We're saying, okay, fine, let's address all the issues.

You now raise the fact that Mr. Nelthropp didn't raise them really is of no moment, because we are entertaining them. So at this point I probably should have asked for an offer of proof, but again –

THE COURT: Okay. All right. Mr. Wiseman?

MR. WISEMAN: My preference would not be to make my point while the witness is on the stand, if that's all right with the Court. I'm prepared to make a response only if the witness is excused.

[171] THE COURT: You can come up here. I'm not going to have him leave.

* * *

(Whereupon, the following discussion took place at sidebar:)

MR. WISEMAN: Your Honor, there are two responses. First, Mr. Rompilla is entitled to the effective assistance of counsel and to get an appeal in due process. And if he does not get it, he's entitled to a new appeal, the old one thrown out, and it doesn't have anything to do with a relaxed waiver. If Your Honor finds that counsel was ineffective, it goes to the Supreme Court, and he gets a new appeal.

Secondly, there were issues of delay that are relevant also to the United States Supreme Court and the case is called Lackey, L-A-C-K-E-Y, and it explored not only the question of time on death row relative to the delay, and by delay I don't mean delay caused by the defendant, delay caused by other actors in the process. These questions are relevant to this issue as well.

Finally, the whole issue of exhaustion of state remedies intertwined with delay. The third circuit ruled quite literally a number of cases such as Story v. Kindt, K-I-N-D-T, where long [172] delays in the state court's processing of issues can lead to the exhaustion of defendant's appealing.

These are all issues that are relevant to Mr. Nelthropp's testimony.

MS. PARADIS: The exhaustion issue, I understand what he's saying in terms of delays and things of that nature, however, we're starting here in PCRA court and addressing all of the issues that ultimately are going to conceivably, unless the Court rules in Mr. Rompilla's favor, will be addressed in the Supreme Court of Pennsylvania and it's a collateral approach.

So that I'm not sure I understand how Mr. Nelthropp's not advancing arguments that are now being substantively addressed is any way prejudicing his client. They are going to be addressed here. If they are exhausted, they are going to be exhausted from here on out, not back two years ago or three years ago when the appellate process was going on, the direct appellate process was going on. We're talking about exhaustion from this point forward, not exhaustion back three years ago.

THE COURT: Are you saying what he needs is a factual basis for many of the issues that you raised, and that's why –

[173] MR. WISEMAN: Well, there's a number of different components to it. The delay issue is something that I want to explore. The ineffective assistance issue has nothing to do with the delay. It has to do with Mr. Rompilla's right to a new appeal from square one. If Mr. Nelthropp was found to have been ineffective in this area of the law, what is good law one day is not always good law the next day.

I'd hate to come back years from now on an issue that we thought a relaxed waiver would apply to and that some

court somewhere else may decide doesn't apply. I think it would be prudent to get the information while we're here so we don't have to come back and do it again later.

THE COURT: That's what I thought we may be concerned with. All right.

MS. PARADIS: It's just that Mr. McIntyre conceded that we aren't going to argue waiver, that he's getting his appeal now. He's getting the appeal on the merits of the issues currently raised.

MR. WISEMAN: Different standards, Your Honor, on direct appeal and on PCRA, some issues and some circumstances. So he's entitled to pursue a direct appeal remedy.

[174] MS. PARADIS: But the bottom line is effectiveness of trial counsel, not whether or not appellate counsel looked at trial counsel's effectiveness. And the issue is, this is still a PCRA, and, bottom line is, was trial counsel effective. Not whether Mr. Nelthropp was effective, because Mr. Nelthropp had no part in the trial. So the PCRA is ineffectiveness of trial counsel.

THE COURT: Well, I'm understanding it's relating to appellate counsel as well.

MR. WISEMAN: Yes. Although –

THE COURT: You gentlemen know a lot better then I do.

MR. NOLAS: In a nutshell I can clarify it. The defendant is entitled to effective assistance of counsel on appeal. If the defendant does not receive that, that appellate opinion is no good. It's bad. It's prejudicial. It's something

that can't be relied on in this case. The district attorney's office has relied on it. All right.

In response, and that's independent, it's – we're entitled to explore it and for starters, putting aside what Mr. Wiseman said delaying changing from month to month. And we don't – [175] wouldn't have an opportunity to do something here and not do it.

THE COURT: That I understand. And that's – I felt that was probably a part of it. For instance, however, the fact that he didn't file the appeal, quote, timely initially for whatever reason, that's a non-issue since the Supreme Court granted the right to appeal.

MR. NOLAS: Eventually it would. But I know you can't just do the questioning in a vacuum. I think Your Honor knows that you can't just –

THE COURT: All right. I'll permit it. Let's try to get, for the reason that Mr. – well, both gentlemen mentioned it. Let's get the issues out. Let's get the testimony out and finish it.

BY MR. WISEMAN:

Q Mr. Nelthropp, I was asking you about a letter that you wrote on April 15th, 1994 to Charles Johns, the prothonotary of the Supreme Court of Pennsylvania. Do you have that in front of you?

A What date?

Q April 15, 1994. Can I help you find it?

A I have it, yeah.

[176] Q In this letter, the second paragraph you state to Mr. Johns, I should also inform you that I was appointed by the Court as conflicts counsel and have not received any special remuneration for representing Mr. Rompilla other than my part-time salary.

Is it still your position, sir, after reading that, that your level of remuneration had no impact on your representation of Mr. Rompilla?

A Yes.

Q Why did you write that? What did you mean?

A I know that in some cases when people are appointed to represent you in a murder trial they are directly appointed to do so and then they can devote all their time to it. And what I was trying to say there is I did not have this case as my sole responsibility. I had to survive.

Q You had to make a living?

A That's correct.

Q Economic component?

A It wasn't my sole, you know, reason for it. I didn't have to put that out. That wasn't what – I was trying to do my best for him under all the circumstances I was under.

Q Under the circumstances it was not financially advantageous to put this case in the front [177] of others?

A I wouldn't say advantageous. It's just that I have to make a living, and it's not a question of to my advantage. I have to work. I have – I have other cases to do, and I have to fit everything in.

Q In the next paragraph you state, as conflicts counsel I have a heavy case load along with private cases which I handle.

A That's correct.

Q With regard to our discussions, the county at this time is presently trying to hire a third conflicts counsel due to the fact that one attorney just resigned. It's – it's a heavy case load and demands of criminal court.

A That's correct.

Q Correct me if I'm wrong, what you seem to be saying in this letter is I've got a lot of cases, I'm conflicts counsel, to make a living I can't make a living doing just this case as my main priority, is that a fair statement?

A I couldn't make it my main priority, that's correct.

Q Now, do you recall that Mr. Rompilla wrote a number of letters to the prothonotary of the Supreme Court of Pennsylvania complaining about you?

[178] A I don't know if I received every one that he wrote to me, but I did receive a letter showing here that he did – he did contact him, and then Mr. Johns contacted me.

Q Well, if you look at the next – right after the appeal nunc pro tunc petition in the packet I gave you, you'll see a letter dated December 13th, '93 addressed to Mr. Rompilla by the deputy of the prothonotary of Pennsylvania Supreme Court?

A Said March 21.

Q December should be towards the beginning.

A Yes. I see that, sir.

Q In that letter you're copied on it?

A Yeah. Um-hum.

Q The letter says, among other things since you, Mr. Rompilla, are represented by counsel, we cannot accept your pro se filings. They are being forwarded to attorneys so they may consider the issues that you wish to raise. Do you see that?

A Are you talking about the –

Q Same letter, last paragraph.

A Talking about December 13th letter from William Corey?

Q That's right.

A Please review them.

[179] Q One before that. Also a letter on Mr. Rompilla.

A Okay. Yeah. I see that, yeah.

Q So basically it says, Mr. Rompilla talk to your lawyer about the issues you want to raise?

A Yes.

Q Did you talk to Mr. Rompilla about them?

A Well, he sent me a package of the issues and I used them. Any information he sent me, I used them.

Q Well, did you use – ever use them or put them on the back of your brief, submit them?

A Some of the issues I felt were proper to put in the brief, some were not. And I put them anyway. I submitted them anyway.

Q Did you discuss with Mr. Rompilla either in writing or in person or by phone the merits of the issues that you wished to raise?

A I don't know if I wrote him a letter stating that I would incorporate certain issues. I can't recall if I contacted him about it or not.

Q All right. If you flipped the page, the next letter, which is dated also December 13th for Mr. Corey, this one is addressed to you, it says, among other things please review the issues and consult with your client about whether you were to proceed on those [180] matters.

And correct me if I'm wrong, but what you seem to be saying is you didn't really consult with Mr. Rompilla, you decided what was good and what was bad, and you went with it?

A That's correct.

Q Now, if you flip the page you'll see a series of letters that Mr. Rompilla wrote to you. I won't take you through every line of them, just some samplings in regards to this question of whether Mr. Rompilla was a demanding client or not.

On the first letter the date is slightly obliterated, look likes 3/4/90 something. Mr. Rompilla wrote you three letters. This is my fourth letter to you concerning our legal problems and of this day you still refuse to answer any letters or show any interest in my case. Again, I ask you to

send all legal documents and trial notes to me and answer my legal questions.

Did Mr. Rompilla fairly characterize your, what he calls your lack of responsibility necessary for his inquiry?

A Well, at the time I received, you know, scores of letters from the prison. Every prisoner that I represent, every client I represent wants me to spend [181] every minute with him. So this is not very different from maybe four, five other letters or six I get in a week from my clients. And I contacted him when I could, and I sent him letters, and I sent him – I believe I sent him a copy of a memorandum that was done in the case.

Q Do you feel you responded to him in writing to these questions?

A I didn't respond to him as much as I would like to.

Q Did you respond to him at all at that point?

A Yes, I did. Somewhere along the line I responded. I know I contacted him.

Q The letter goes on, I tried my best to reason with you, and you just ignored the letter of mine, and then he threatens to sue you in ten days it you didn't take action, is that right?

A Yes, sir.

Q Does this refresh your memory perhaps as to whether or not you had a cordial working relationship with Mr. Rompilla or was it, in fact, somewhat tense?

A I have had many clients that have written similar things to me, and I have spoken to them or contacted them

later, and I had aired matters out with them. So I don't consider – every client in the [182] criminal process considers his case the only case, and it is their own case. And I have to respond to them. And I try to do the best I can to respond to every letter. But, you know, it's not possible to respond to everything.

And so I do consider just the fact that he may have been upset at the time, that that was – that was the whole issue. That was the whole attorney/client relationship right there in a nutshell.

Q I understand you can't drop everything and add what your client writes to you. I guess my question though is at this point in time had you responded at all to Mr. Rompilla's writing you these letters, not paying any attention to him?

A I don't know if I responded to him at this point. I know I responded along the line somewhere.

Q If you flip the page you'll see another letter dated 3/11/94, the middle paragraph. He asked you why you didn't inform me the Supreme Court granted your petition to appeal nunc pro tunc?

A Yes.

Q He was making a demand that you had not kept him informed of an important aspect of his case?

A No. He used the word nunc pro tunc. He knew that's what I intended to do.

[183] Q Well, eventually he found out obviously from the letter. The question is, he was making a demand on you again in regard to keeping him informed. He was

complaining I found out about the appeal nunc pro tunc, but you didn't tell me, right, is that fair?

A I may have sent him a copy. I don't know.

Q All right. Why don't you flip the page. The date is – it says date 11, 1994.

MR. WISEMAN: I wouldn't characterize what that is, Your Honor, other than it seems to be 1994.

Q Middle paragraph, it's been an uphill battle with you since 1989 trying to get you to send me the legal issues you plan to raise in my appeal to the Supreme Court and get a copy of the trial notes and other legal documents I have been requesting from you since 1989.

Would you agree that once again Mr. Rompilla is making a demand of you, of your time and effort?

A Yes, he's making a demand that I contact him.

Q Next letter, April 25th, second page, Mr. Rompilla writes, I'm sorry to hear about your heavy case load and private cases. If my case was such a burden to the rest of your cases, you should have [184] removed yourself from my case like I requested in the pro se petition.

A Why? Where are you?

Q Letter of April 25th, 1994, page two.

A You should have removed yourself from the case like I requested in my pro se petition and letters to you. You not only refused to file a pro se petition to remove yourself, Mr. Johns sent you a letter asking you, do you want to proceed with a pro se petition.

Again, you refused to answer Mr. Johns' request and mine to remove yourself from my case. And in a letter to Mr. Johns, April 15th '94, you still come up with excuses instead of giving us answers. Again, would you characterize the tone of that as an angry tone from Mr. Rompilla?

A Yes.

Q Did that tone have any impact on you in your handling of the case?

A Well, I understand, you know, his situation he was in jail and on death row in this matter, and I was trying to get his work out. And that's what I was doing. So I know that clients in this situation are – a lot of them are angry, angry they are incarcerated. So I don't – you know, it doesn't necessarily mean that they are actually angry at me per se, maybe just [185] angry in general.

Q Did you feel increased pressure to get the matter filed when you received these letters?

A Well, I had pressure to make sure that things were done. I was looking at making sure that his cases were – his case was taken care of and the matters were addressed.

Q If you turn the page you'll find the three-page document that starts by a cover letter addressed to Mr. Johns enclosing a pro se, handwritten petition to have you removed from his case. This petition was sent to the Supreme Court and appears to be dated November of '93, although the date again is not written in a way that's understandable. Have you ever seen this petition before?

A I may have seen it. It wasn't on lined paper.

Q I'm sorry?

A It wasn't on lined paper, the original.

Q I don't know lined or not, I just have the photocopy. Without reading every line essentially Mr. Rompilla is again complaining this time to the Supreme Court that you're ignoring him and ignoring his case, and he wanted you off the case. Did you take any action when you got that petition, did you agree with [186] the Court, did you offer to withdraw, did you oppose?

A I think I wrote them further down the road that I would withdraw if that's what he wanted me to do. I didn't after that letter, but somewhere along the line I did. He mentioned that on several occasions, and then I did after the documents were filed. I don't know if he proceeded, but on March 15th I did respond to him and responded to his –

Q Well, we'll to get [sic] that, Mr. Nelthropp.

A That's the same year. I believe it's March 15th. It's responding to his – to his petition or to his request.

Q Why don't you turn the page on the petition, and there's another letter, this one addressed to Mr. Corey, again deputy prothonotary of the Supreme Court, March 3rd, '94. And Mr. Rompilla writes, among other things Mr. Nelthropp refuses to answer my letters. I sent him a copy of legal documents and requested new counsel. He still refuses to communicate with me on how he will proceed with my pro se petition.

I'm in a serious stage of my appeal and need Mr. Nelthropp to communicate with me concerning serious issues to be filed in my appeal. He also says still shows no signs of interest in my [187] appeal in turning the page, I

wrote you, meaning the prothonotary, a few letters concerning Mr. Nelthropp's lack of interest with my case since 1989.

I wrote counsel and asked him to file a petition to the Supreme Court to remove himself from my case, and he refuses to do so. Then he goes on and says, Mr. Corey, I would appreciate any help in order to get counsel to communicate and send me copies of my trial. So it appears from this letter that at this stage Mr. Rompilla felt still dissatisfied with your level of communication, that you weren't communicating and that you weren't sending him the trial that he requested since 1989, is that right?

A I guess that's yes. I do know how he feels.

Q That's what the letter says. Now, if you turn again towards the back of the file, March 1, 1994 to that letter written by Charles Johns to President Judge Diefenderfer.

By the way, you had gotten correspondence from the Pennsylvania Supreme Court during this period forwarding some of the letters Mr. Rompilla had sent to them and asking you to do something, is that right?

A I may have. I don't –

Q The letter of March 21st, '94 from the [188] prothonotary of the Supreme Court to Judge Diefenderfer states among either things, as you notice, the appeal communicating the lack of communication between counsel and himself, correspondence from this office urging Mr. Nelthropp to correspond with his client, has been to no avail.

So apparently Mr. Johns was also complaining that your level of interest or action with your client was not satisfactory, would you agree with that characterization?

A He's complaining, yes.

Q Mr. Johns is complaining?

A Yeah, he's complaining.

Q The fact that he forwarded this correspondence to the president judge of the county up in last paragraph asked the president judge or suggested to the president judge you might want to review this material in considering any fee application he may make to Mr. Johns, right?

A I received this from Mr. Diefenderfer for – I don't see that he has stated anything directly to me. He didn't – this already was agreed to by Mr. Diefenderfer. I know how he had felt.

Q You are copied on it?

A Yes.

[189] Q So you got this letter?

A Yes, I did.

Q Were you feeling at this point pressure about this case?

A Yes.

Q You were?

A Yes.

Q Because you had done what the Supreme Court told you to do vis-a-vis your client, and you certainly didn't do what your client asked to you [sic] do.

A Not as much as I would have wanted. Not as much as he would have wanted to.

Q Because of pressure, the case load you had and subsequent issues?

A Mostly the case load.

Q Sir, time is money isn't it, right?

A I'm not going to get into argument about it. Time, there is only so much time.

Q Only so much time in a day. You have to make a living, it's perfectly understandable. The question is different if you didn't have the time, but isn't there a monetary component to that?

THE COURT: I think we've gone over this, counsel.

MR. WISEMAN: Sure, Your Honor.

[190] THE COURT: Just being repetitive now.

Q Sir, is it your testimony then, Mr. Nelthropp, of these dealings with Mr. Rompilla or the Supreme Court of Pennsylvania impacted upon your preparation of the appellate brief in this case?

A No. I mean I prepared the brief to the best of my ability and did it, as you know, I was instructed by the Court to do it as conflicts attorney. We're not – in many cases we're not taken off of a case just because someone complains.

* * *

(Whereupon, Defendant's Exhibit Number 11, was marked for identification.)

MR. WISEMAN: Your Honor, I've had marked the document which is captioned Commonwealth versus Rompilla, brief for the appellant submitted by Mr. Nelthropp, and I'm going to ask Mr. Nelthropp some questions about the brief itself.

MS. PARADIS: Your Honor, I'll stipulate that the brief does not contain the issue now raised in the PCRA petition.

THE COURT: All right.

Q Mr. Nelthropp, could you look at the table of citations that's four pages into the material?

[191] A Yes.

Q Could you just quickly scan that if you would. Are there any cases cited in there that were decided by the United States Supreme Court?

MS. PARADIS: Your Honor, at this point I'm going to object again on relevance. The petition that has been filed by the defense in this case regarding ineffectiveness of appellate counsel states that the extent the trial counsel or appellate counsel failed to appropriately litigate, raise or object to or otherwise remedy any of the above claims, that being the claims raised in this petition, petitioner serves such failures were ineffective assistance of counsel.

So the argument that the styling of the brief or issues raised in the direct appeal weren't good are irrelevant in light of the way this allegation in the petition is phrased.

The only allegation of ineffectiveness as to appellate counsel raised in their petition is as to whether or not he picked up on these issues. There's – it's not the way he litigated his issues, how he prepared his issues, his attorney/client relationship, any of those things are not raised in the petition.

THE COURT: And that's what you [192] were referring to earlier with Gross?

MS. PARADIS: This is not relevant.

MR. WISEMAN: Your Honor, I intend to question Mr. Nelthropp about the issues contained in our petition as they were treated in his brief. That's exactly what I'm asking him about.

THE COURT: What are you making reference to?

MS. PARADIS: Page 105 of the petition filed by the defense.

THE COURT: Right.

MS. PARADIS: The only allegation is regarding the ineffectiveness of appellate counsel. And it's a catch all. It says to the extent appellate or trial counsel –

THE COURT: This is paragraph 13?

MS. PARADIS: Your Honor, to the extent they failed to speak up on the issues raised in this petition, we attributed this to ineffectiveness of counsel. There's no allegation in here regarding appellate counsel's ineffectiveness in other areas. And I think it's appropriate to object again at this time if we're going to spend the next hour going over the issues, how they were raised, what

case was used, [193] things of this nature, because it's not in the petition at this point.

MR. WISEMAN: Judge, it is in the petition.

MS. PARADIS: Ineffectiveness on those grounds.

THE COURT: How is it in the petition?

MR. WISEMAN: I'm going to ask him about his treatment of issues in his brief that are in our petition. Either the way I treated or what way he did not treat a particular issue that we are raising.

THE COURT: What issues are you talking about?

MR. NOLAS: Your Honor, just so the record and Your Honor is clear with the – within each of the claims in the PCRA petition that were either inadequately prepared on appeal or not presented on appeal, there are claims of ineffective assistance of appellate counsel. In other words, that paragraph that the district attorney read to Your Honor, the summary at the end that you have other sections throughout the petition when dealing with each of those claims for relief.

MS PARADIS: And those relations [194] are that counsel, appellate counsel was ineffective for failing to raise these issues which we are now litigating.

THE COURT: All right. It says to the extent appellate counsel failed to appropriately litigate, is that what you're talking about?

MR. NOLAS: Yes, Your Honor.

THE COURT: – As opposed to just raise objections to or otherwise remedy. In other words, it's more than just the raising – the recognizing of the issues that they are claiming constitutes ineffectiveness, that's – am I understanding correctly?

MR. WISEMAN: Yes.

THE COURT: So it's not just the raising of them, that's what you're asking now, that it was your – your claim is that it was inappropriately litigated?

MR. WISEMAN: Exactly. Exactly.

THE COURT: All right. All right. we'll hear it. Co ahead.

Q All right. I think the question, Mr. Nelthropp, was, did you cite any United States Supreme Court authority in your brief?

A No.

[195] Q Did you cite any federal authority in your appellate brief?

A No.

Q They are all Commonwealth of Pennsylvania cases?

A That's correct.

Q Now, did you read the Pennsylvania Supreme Court opinion when it came out in this case, I'm sure you did, right?

A No, I did not see it.

Q You never saw the opinion in this case?

A I saw the opinion that was denied, yes.

Q I'm asking if you read it.

A I believe. I don't have it in front of me.

Q Did you ever read it?

A Probably did.

Q The Pennsylvania Supreme Court addressed the question among others of whether or not the jury instruction regarding torture was proper. Do you recall that?

A Yes.

Q That's not a point that you recognized in your brief?

A No, I did not.

Q Had you ever – I'm just going to name a [196] couple of Supreme Court cases related to that question. Have you ever read Godfrey v. Georgia?

A I may have. I, you know –

Q Are you aware now of the – were you aware at the time you wrote the brief that Godfrey v. Georgia deals with arguably facial vagueness of aggravated circumstances?

A No, I was not.

Q Had you ever read Mainer v. Cartwright of 1988?

A Probably. You know, that name rings a bell.

Q Do you have recollection of what it addressed?

A No.

Q It – he told you that it also addressed the question of facial vagueness of aggravated circumstances. Can you think of any strategic reason why you would not have put that in your brief if you thought the issue worthy?

A I didn't – I didn't consider that issue, you know, that's – I didn't put torture in. I didn't discuss the issue of the vagueness. So it wasn't in – I mean –

Q Just a couple others. How about Klements v. Mississippi or Shelby, decided 1990.

[197] A I don't recall reading those later or before that. All the paperwork I had in this case I turned it over to your office. So I wasn't able to review any of the briefs or opinions prior to today.

Q Do you know what Mainer v. Cartwright or Shelby or Klements, any those cases I just mentioned, do you know what they have to say about the aggravated circumstance of heinous, atrocious and cruel?

A I remember reading about it, but I couldn't tell you about it at this moment. I couldn't tell you at this time, but I remember reading those issues about torture, looking it up, researching it at one time or another.

Q In regard to this case?

A Maybe not in regard to this case, but at some time I have. Those cases do ring a bell, but I haven't reviewed them. I haven't seen them at this point, so I couldn't tell you about them.

Q Do you remember if you read those cases before or after you wrote this appeal?

A I couldn't tell you.

Q Now, you raised a point on page 14 of your brief regarding the reading of rape victim's testimony for the jury at the sentencing phase, do you recall that?

[198] A That's correct.

Q Do you recall what the arguments on both sides were regarding the admissibility of that transcript?

A Did – it was presented in front of the Supreme Court on the issue – one of the issues was – it was no – there was no law in Pennsylvania about that specific issue. All you had was law concerning bringing in the prior record, the prior accounts. But to read the transcript itself and go through the transcript word by word, there was no case in Pennsylvania that said that. That I argued was going to be beyond the bounds of what was intended by the law.

Q Now, in your evaluation or the treatment of these issues, were you aware that the Commonwealth's reason was authority for being able to read that transfer and show the prior burglary as violent crime?

A Yes, I argued that before the –

Q Commonwealth v. Beasley?

A – Supreme Court. The justices were citing a case that was not relevant at the time of the case that made the burglary appropriate at this time but not at the time that the defendant was – the crimes were committed.

[199] Q All right. Let me – just so we can make this out quickly. At the time of the trial proceeding, the Commonwealth argued that Commonwealth v. Christie was

the authority that said burglary is not inherently violent and thereafter we have the right to read the transcript.

A That's correct.

Q And is it also correct that probably three weeks before the penalty phase the Supreme Court decided a case called Commonwealth v. Roland?

A That's correct.

Q And Commonwealth v. Roland, which is the one you've heard by the Court, that burglary is inherently violent?

A Yes. Because it was brought up when I was arguing that very issue. And that was assuming that it did appeal any or all of this..

Q So Christie and Roland and the application, one to the other, how they impacted on the admissibility of the transcript is obviously an important issue?

A That's correct.

Q Are you aware of the decision Commonwealth v. Baber which essentially affirmed the whole Commonwealth v. Roland that is that burglary is an inherently [200] violent crime?

A I may have seen that case. I'm not aware at this point.

Q How about Commonwealth v. Rivers, which was decided 1994 which stands for the same proposition. Are you aware of that authority?

A Without the paperwork in front of me, no.

Q Have you – having just said that Roland and Christie and their interplay were important issues in this case, isn't it true you didn't cite either of them in your brief?

A They were cited in Court.

Q Were you in court?

A I wasn't in court.

Q They were cited in court or from the brief?

A They were cited in court.

Q Did you have strategic reason for not putting them in your brief?

A At the time of the brief there were other issues that I wanted to bring forward to help in the case that I did not put normally on the brief.

Q My question is, did you have a strategic reason?

A No.

Q Was it an oversight?

[201] A It may nave been an oversight.

Q The last thing I wanted to ask you about, sir, was the first point in the brief related to the admissibility of photographs in this case. Do you recall that?

A Yes.

Q Did you ever see the photographs?

A Yes, I did.

Q Where was it that you saw them?

A I saw – I can't recall where I saw the photographs, but I did see them either from the district attorney's office – somewhere along the line I did get to see the photographs.

Q Do you know – withdrawn.

Did you ever determine whether those photographs were forwarded to the Pennsylvania Supreme Court for their viewing?

A I thought that the file was sent to the Supreme Court, the whole thing, those photographs were included.

MR. WISEMAN: Very well. Thank you very much, sir.

* * *

CROSS-EXAMINATION

BY MS. PARADIS:

[202] Q Just a few questions, Mr. Nelthropp. Mr. Nelthropp, did you have a different type of relationship with the defendants that you were appointed to represent post trial than those that you are appointed to represent pretrial?

A Well, the ones that I have pretrial I get – I have more familiarity with and I represented them through the trial process. And when I got a client afterwards, the case that's already been completed it's more difficult. I have to jump in and then see what was there from before and try to learn the issues that I wasn't present to see myself, but I want –

Q And you do that by review of the transcript?

A That's correct.

Q And you indicated – you indicated that you kept those transcripts until you were finished writing the brief, is that correct?

A That's correct.

Q And you indicated that Mr. Rompilla's case was not the only case that you worked on during the period of time that you represented him as appellate counsel, is that correct?

A No. At that time it was on Mr. Sieger and myself doing the conflicts, you know, work. And we were getting a lot of cases. I'd spend maybe three [203] or – I probably went to Court almost every day on the conflicts.

Q When you did sit down and review the case, reviewed the transcripts, did it receive your undivided attention during the time that you were actually working on the case?

A Yes, when I sat down to review it.

Q Did you familiarize yourself with the facts of the trial?

A Yes, I did. I spoke with Mr. Dennis Charles – Fred Charles and Maria Dantos. I spoke with them about the case. And I spoke at length with Fred Charles, because he had been the trial counsel, about what the issues he felt were important since he was the one that had tried it.

Q Did you receive from the public defender office their file?

A Yes. What they gave me was a file with items in it, and that's what they gave – what I received. I then continued over to the – to the individual sitting here.

Q You did research on this case, is that correct?

A That's correct.

Q You wrote a brief?

[204] A That's correct.

Q Familiarized yourself with the facts of the case?

A That's correct.

Q So you didn't ignore his case?

A No, I did not.

Q You may not have had correspondence with Mr. Rompilla on the basis that he would have liked, but – or sent him, the things that he would have liked, but you didn't ignore his case?

A I didn't ignore his case. That case was one of those things I was doing at the time. And it was something I was doing. It wasn't just something that I just didn't want to deal with.

Q Okay. Now, you were asked about your familiarity with certain cases, and you indicated that you were familiar with the case law that held that burglary in and of itself is a crime of violence, correct?

A That's correct.

Q You brought those cases to the attention of the Supreme Court for what reason?

A To help in the defendant's appeal.

Q So when you –

A To help in his case, his argument, and the [205] argument of his appeal.

Q So when you presented that issue to the Supreme Court, is it fair to say that you didn't present that issue solely on the basis of whether or not there was prejudice in the reading of the testimony, but also that it was unnecessary, because burglary was, in and of itself, a crime of violence by definition?

A That's correct.

Q So you raised those issues in front of the Supreme Court. They heard your issues and made a decision despite your raising them, is that correct?

A That correct.

Q You already indicated that they queried you on that particular area of the law?

A There was a member – several of the justices discussed that issue. That was brought up. That was – that's one of the questions that was addressed there in the panel before the Supreme Court.

Q Okay. And so they were apprised of the issue?

A That's correct.

MS. PARADIS: I have no further questions.

MR. WISEMAN: Nothing further, [206] Your Honor.

THE COURT: You may step down, Mr. Nelthropp. Thank you. Give it back to the court reporter if you could.

MR. NOLAS: Your Honor, what time would the Court break at, 4:30 or 5? Mr. Charles is back at his office. I told him we'd call him when we were ready for him, we're proceeding today. But it took longer with Mr. Nelthropp. If Your Honor wants to we could pick it up tomorrow or break for the day and start fresh tomorrow.

THE COURT: Apparently my secretary called Mr. Charles to tell him to come on over, so we'll go for a while on it then.

THE COURT: Mr. Wiseman, Ms. Paradis, my law clerk just gave me this. My law clerk got from the clerk's file, the, pages in D-7. I don't know if you want anything more than that, Ms. Paradis. Are you satisfied that it be admitted? I assume if they are the identical pages and the case number is 1496 at 1994.

MR. WISEMAN: So the record is clear, we are agreeing that this came out of the Court file?

THE COURT: Yes. That's the D-7 I [207] believe, right?

MR. WISEMAN: Yes, Your Honor. One other aspect of the timing here, through no one's fault we didn't get to speak with Mr. Rompilla about the proceedings before he was brought in this morning. We came sort of late in the day. We were keeping track. We frankly wouldn't mind a slightly early break so we can spend some time with him tonight, could be extensive time. And it would be my request if we do 'break now. I would appreciate that. It would be my preference.

THE COURT: Since Mr. Charles is on his way I believe, right, I think we'll take a little bit. We won't stay too long. We'll go maybe to quarter of 5.

MS. PARADIS: I have a 5:00 appointment.

THE COURT: That's why I thought the quarter of 5 would be – is that enough time for you? Are you all right then?

MS. PARADIS: Yes.

THE COURT: We'll just be in recess. I'd like the people to stay around here until Mr. Charles gets here. He should be here momentarily. His office is very close. All right. We'll be in a [208] brief recess.

* * *

(Whereupon, a recess was taken.)

THE COURT: All right. Mr. Wiseman.

MR. WISEMAN: Yes, Your Honor. Mr. Charles.

* * *

FREDRICK CHARLES, ESQUIRE, having been duly sworn, was examined and testified as follows:

* * *

DIRECT EXAMINATION

BY MR. WISEMAN:

Q What's your occupation, sir?

A I'm an attorney.

Q For how long have you been an attorney?

A. About 18 years.

Q And working backwards if you can just give us a brief description of the types of law you've practiced in those 18 years?

A Okay. Well, I've practiced criminal law since I passed the bar. If I can go backward and start forward I started with Attorney Wallace Worth's office in 1977. I remained there until 1979. I became assistant public defender in '79. I was an assistant [209] until 1991. In 1991 I became chief public defender. I remained as chief until 1991 at which time I became Lehigh County Solicitor.

I remained solicitor from '91 until the first week, of January of 1994. Since '94 I've been in private practice. I've done criminal defense for my entire career. I do federal litigation, personal injury, divorce, contract work, a little bit of everything.

Q Obviously you know the defendant, Ronald Rompilla?

A Yes, I do.

Q You do know him as you represented him in this capital case?

A Yes.

Q That was roughly 1988?

A Yes. I think this offense took place in January of '88. And the trial was in October and November.

Q And that was while you were chief public defender?

A Correct.

Q Did you have any other public defender assigned to the case?

A Attorney Maria Dantos.

[210] Q Was there a breakdown of responsibility between the two of you?

A What do you mean by that?

Q Well, do you each have separate responsibilities in the case?

A I guess. I mean not really. We both worked the case. We worked it. I was first chair, she was second chair. She had certain responsibilities, but they weren't really allocated, this is what you'll do, this – it's as it came up. She would interview the defendant.

We had an investigator who would conducted investigations and report back. We dealt with forensic people. I would assign things for her to do, and she would do them. But it was kind of like it really was more so co-counsel, you know, but we split up responsibilities.

Q Was there a division of responsibilities in regard to the guilt and penalty phase?

A She – what we did in the public defender's office for years we had a capital offense, and we would have one person responsible for the death penalty phase because of the nature of that kind of proceeding. I took the case in chief, she took responsibility for the death penalty phase.

[211] But this is not to say that she did not have responsibilities or work with me on the case in chief or that I didn't work with her on the death penalty phase. I don't know if that answers your question.

Q Was there, for lack of a better term, a chain of command as a final decision maker?

A Me.

Q And that would apply to the penalty phase?

A It would apply to everything in that office for every day that I was the chief. The responsibilities were mine, I had the last say, I was a hands-on chief. I was at every trial that my office had during that entire period, and I made decisions on trials that I was trying and that others in my office were trying. I had the last say on every issue in the Rompilla case. Does that answer the question?

Q Sure does. By the way, you produced a number of documents in response to this subpoena that was served on you I guess by both through the Commonwealth and my office. Aside from those documents you produced do you have any other handwritten documents or typewritten documents that you have yet to get your hands on?

A No, sir.

[212] Q You have given us everything?

A As I advised you earlier, I had some of the files in a building on 10th Street that had water damage. Some of the files were destroyed. I've gone through everything. Especially I received your subpoena duces tecum. And the documents I provided you were documents that I found in other files. Some of them were forms also with like suppression motion

and law and argument on that. So, yes, you have everything that I have, as far as I know to date.

Q There was an issue in this case that arose during the guilt phase regarding the jury question about accomplice liability?

A Correct.

Q Would you tell the Court your understanding of what that issue was in terms of the note?

A What I understood happened was that after the closing when the jury got together and started talking about it, somebody in the jury raised the issue that what if there – what if he was acting as an accomplice, can't we treat him the same as if he was an actor in chief.

And so a question came back very shortly after the jury went out. And the question was if we find that he was acting as an accomplice, can we [213] convict him of first degree murder. That's what I would I [sic] recall. Basically I haven't seen this since – you know, this is just straight up out of my memory.

Q Do you have any thought as to the evidence that went in in the guilt phase that would have led to that type of a question?

A Yes.

Q What are your thoughts on that?

A When we looked at the forensics and we cross-examined one of the FBI witnesses there was evidence that Mr. Scanlon had defense wounds. And they had taken fibers from his hands and other parts of his body and had tested them. And they came and they took samples from

Mr. Rompilla I believe because they were certain, they being the Commonwealth or FBI or prosecution, that they would match, and they didn't.

And so it was a very, very, very sensitive way of handling this, okay. But what I told the jury was, and I even stood in front of them and I almost did it in a boxer stance. And I said as Mr. Scanlon was defending himself who he was fighting with, you know, would have evidence of who that was when he opened his hands. And they tested it, and one thing, you know is it wasn't Mr. Rompilla. And so you cannot convict him was my argument if somebody fought [214] with him. But it wasn't Ron. And that was the argument I made to the jury.

And if I can explain it, there was a lot of evidence here. Mr. Scanlon had very rare blood. I think the testimony was four percent of the world has it. That blood was taken, and there was a print right by his head that they lifted of the tread. It was a Reebok tread, and it matched Mr. Rompilla's tread. And the blood that they tested from his shoe turned out to be matched up with that rare blood. So it was kind of a touchy situation.

But I thought our best evidence to argue against his being the fighter or the actor with Mr. Scanlon was the samples. But we tried to handle it strategically in a way that we left that issue open, saying whatever, that if you find he was there because the footprint is there or because that blood is on the shoe, then that means that he was, if his foot hit that tile. But it's great big help to take the actor or the one who had committed the murder out of there.

The problem I have and when I say strategically I'm a little cold on this, because I haven't looked at this in a

while. And the file had been out of our control for a long time. But I believe that there were three stab wounds from the back with a [215] knife that reached the heart. That's my recollection, one or two or three. But at least one of them reached his heart from behind.

The blade was broken off in two places, and this was a very smart jury. And you would figure it would take a bull of a person, at least I thought, to be able to take a knife, ram it through someone's back and get to the heart, ram it in and break it off in two places. And I mean Mr. Rompilla is a very, very imposing man as he is now. But he was, you know, also probably even more so in '88.

And he was very well put together. And, you know, I wanted to go real light on that, because I just wanted to have that in the jury's mind, that whoever Mr. Scanlon had the defense wounds from, and we had the samples from it, it wasn't Ron, so his footprint is there, but that doesn't make him the murderer. And that's the way I approached the jury closing.

Q Obviously you didn't argue in the guilt phase that he was an accomplice, because this wouldn't have gotten you anywhere?

A I didn't argue this. It wasn't charged. He wasn't charged as an accomplice. He never told us he was an accomplice. He never told us somebody else did [216] it. He said he didn't do it. He had – and he had no idea who did. And, you know, so I took the facts that we had.

Q I guess my question was perhaps inartful. Your knowledge of the criminal law is that if he were convicted as an accomplice it would have been the same level of culpability as being picked as the principal?

A Yes. But he wasn't charged as an accomplice.

Q You didn't pursue that strategy in the guilt phase, that there was an accomplice?

A Not that he was an accomplice. I pursued that someone else did the killing, even if he was in the place he wasn't the killer. The killer who's – whoever's fibers matched up with whoever they took off Mr. Scanlon. That was my idea there. I don't know if that answers the question.

Q Okay. Would you agree that with the rendition of the guilt phase verdict, that Mr. Rompilla's role as a possible accomplice took on a different dimension?

A Yes.

Q And why is that?

A Well, jeez, okay. On one hand you have an argument that he had a minimal role to be used as a mitigating factor. And I believe that was even [217] requested in a point for charge to Judge Mellenberg. On the other hand, you've got a jury looking at you that's going to decide his life who you have just gone through an entire trial and just closed and told them that he was not the actor, he was not the murderer and you can't give you [sic] any evidence as to who was.

And now you're going on to the death penalty phase, tell them yes he was involved, but it was minimal, you know. He was one of the people doing this. He was, but he was an accomplice. We know who did it, we just didn't tell you. I think that's very dangerous strategy, because I think what it does is first of all the jury's looking at you in a very different light after they have convicted him.

Second of all, I think it's a problem to in effect now tell them, yes, we weren't telling you the whole story up to the guilt phase in and out, but now we're going to tell it to you. I think you risk losing any chance to appeal to their mercy-dispensing power.

And so that it took on a different aspect. It is certainly something that we were cognizant of and we had to deal with. But it is a strategy thing. And it's something we talked about, we requested a point for charge for Judge Mellenberg to [218] charge them concerning that mitigating factor. And we talked about how we were going to, you know, handle it, use it, but not have it alienate the jury to the point where they would be – would be so angry we lost any chance to appeal to their mercy-dispensing power.

Q How did you then handle it with the jury? Well, you didn't do the penalty phase per se, you didn't present the witnesses, make the argument, but how did the defense team handle the accomplice issue in the penalty phase?

A I believe that Attorney Dantos made a very, very passionate appeal to the jury on closing that, hey, you're not certain that he was the actor here, your question that came back it is very, very strong that you have some question. And if you have questions as to whether he was the actor, whether he was the killer, or whether someone else did it, then you can't – you can't, you know, execute him. You can't give him death.

If you have a question, you have to give him – give him life. And she handled it very well. And she handled it totally in accordance with the strategy that we talked about. And I think that the way she did that, did appeal to their mercy-dispensing power. And I think she did it [219]

extremely effectively. The problem that came up and I think did us in or harmed us wasn't the way she handled that issue, I think she handled that extremely well and exactly the way we talked about handling it.

Q Was arguing or – withdrawn.

Was the treatment of the accomplice issue in the penalty phase something that you talked about and strategized over before the jury sent the note or after the jury sent the note? Or did you see this issue coming down the road or something that you responded to after the jury's note came out?

A The accomplice issue first really criticalized [sic] itself when we saw some of the forensic reports from the FBI that didn't match the fibers taken from Mr. Scanlon with Ron. That's when that issue first came on board that Mr. Scanlon put up a unbelievable fight, okay. And so in doing so and with the classic defense wound, and I can still remember asking Dr. Mihalakis to explain them, they were classic defense wounds.

And they showed he put up one heck of a fight. And so my argument was if he put up that kind of a fight with Ron, clearly some of Ron's fibers or something from Ron would have appeared in his hands or on his body. The fact that there were none meant [220] that Ron wasn't the one battling with him. That's the argument, and that's what crystallized to me, and that's how I approached that FBI witness. And that's how I cross-examined him.

And that's when it first crystallized. I thought we got all we could get from that during the case in chief. And I argued it to the jury. And I thought it was fresh in their minds. And I thought that, you know, the argument took

place on a Monday, and I think Maria's argument took place two days later. And I thought that that issue was pretty fresh with them. And I thought she handled it very well.

Q I guess what I am asking is a little different. You made some sort of decision to treat the accomplice issue in the penalty phase in a particular way? My question is, when did you arrive at that decision? Was it before or after the jury sent out its note?

A On the penalty phase?

Q Yes.

A I'm missing your question, and I really don't know what you're asking me.

Q Sure. Let me try again then. Obviously you were concerned with the accomplice issue as it related [221] to the forensics and the guilt phase. And you were concerned with that for some time in the case as you just said?

A Concerned? I thought it might have been the other thing we had in our favor. Concerned? That was the one thing I thought we had to hang our hat on.

Q It was a big issue?

A Yeah.

Q My question is leaving the guilt phase, did you give consideration to the use of the possible accomplice argument in the penalty phase? Did you consider that before the jury note came out, or did you consider it after the jury note came out?

A The jury note came out while they were deliberating the guilt phase.

Q I understand that.

A Okay. The – did you want to know whether as they were doing that did we consider –

Q Did you get the jury note and say, oh, they are really thinking accomplice, we can use this in the penalty phase. Is this the first time you thought about it, or had you thought about it earlier?

A We thought about it from the time that it became evident to us. We talked about that. At least I thought about it. I don't know. I thought we would [222] have discussed it, but I think that it was evident to me that it was an issue from the time we got the reports back.

As to whether or not we said that at the time the note came, what we were concerned with when the note came was what the Commonwealth was trying to do, to answer that question. And I thought that that was a very – a very good sign that they thought someone else might have done this. But what we were – we are focusing on from the time that note came was fighting with the DA and fighting with Judge Mellenberg about whether or not they should read the accomplice charge.

Our position was no. Accomplice liability is not charged here. Your answer to the jury has to be if you find he acted as an accomplice, no, you can't convict him as the way he's charged. And that took a lot out of us for several hours at this time. What he did – what he did ultimately, you know, we waited it out. We thought that we would use the accomplice or the minimum or minor role argument as a mitigating factor.

And we also put it on our points for charge. So, yes, I mean we did at some point discuss handling that. But now to get it to the jury [223] is what I was talking to you about before. I thought it was something more important to just argue than to try. And just – I don't know how you would introduce evidence, especially after his position was he never did anything. And we argued to them that, you know, he night have been in there, but he had nothing to do with this killing.

Q In your experience as a criminal attorney it's not unusual, or is it unusual, to argue apparently inconsistent positions to a jury? Have you done that?

A It's not unusual. Have I done – have I done that? I think it would be disastrous. It would have been disastrous in this case.

Q I –

A At times, depending on the facts and circumstances, it can be done.

Q I appreciate that you may think it would have been a disaster here. My question was one step before that. Can you argue inconsistent defense to a jury?

A I think you can, and I think the result is pretty clear each time you did that I think you come back with your hat in your hand. But you can't do that, and that's my experience in 18 years and about 1,000 cases overseeing, that's a problem to do this. And it's certainly a problem in a death penalty case.

[224]Q I'm just asking, sir.

A Okay.

Q So, if I understand the gist of your testimony relating to the penalty phase, the accomplice issue is something that you thought was an issue but one that had to be treated rather gingerly?

A Yes. And I think she handled it absolutely perfectly, couldn't have done better. And I don't think I could have handled it better. And I don't say that just because I'm here testifying. I thought the way she handled it was perfect and exactly the way we talked about when we were strategizing on how to handle it, couldn't have been done better. That's why I was glad she handled it. I don't think I could have pulled it off or done it as well as she did.

Q Let's move on to another area. There was obviously a controversy in the penalty phase regarding the reading of the testimony of the rape victim from a prior conviction of Mr. Rompilla's.

A That's a minor way of putting it. There was controversy, that's correct.

Q And let me just put it in a nutshell for the record and tell me if I'm doing it accurately. Essentially the Commonwealth wanted to read the transcript of the rape victim's direct testimony, and [225] in support of that argument they cited authority that since burglary is not apparently a violent crime, they need to prove that, in fact, in this case it was a violent burglary being the Commonwealth's position.

Q All right. And the defense position was what?

A The defense position was first of all that there is no way that this transcript should ever be read. That the value of reading it, even to prove a violent burglary, compared to the prejudice of what was contained in that

entire statement, the probative value of reading it was unbelievable [sic] outweighed to the perjury of Mr. Rompilla by reading it.

We also said that even though our feeling was we would stipulate and concede that the burglary that he was – that they were talking about from 1974 which had a rape attached to it, that was a crime of violence. And so for the purposes of that phase there was no need to read that transcript into the record. We will concede all you want that extra element that aggravating factor that there were a significant number of convictions of felonies involving violence. Significant at the time being more than one.

And we would concede that he had [226] that. And we would concede that element and concede that the burglary of Joe's Bar or whatever that was in '74 was a violent burglary. And we offer [sic] to concede that. The DA had said you can't limit me. I have the right to go in and do whatever I want to do as far as I want to show it to the jury.

I don't know if we could have objected more to anything. I mean I think the report is filled with objections almost on an hourly basis. But we object to it, offer to stipulate, and the Judge ruled that they could bring that transcript in. And that is what did that phase in for us, not the handling of the accomplice in my opinion.

Q Now, just to digress for a moment, when I read the transcript I noticed a number of objections where you tried to get a word in during the penalty phase, and the judge, often after the DA objected, said Ms. Dantos is handling this part, we're only going to hear from one lawyer, and you were sort of –

A I was dying. Yes. Yes, I remember.

Q Puzzled?

A Yes.

Q Dying would be fine?

A Yes.

Q So Ms. Dantos was left with the [227] responsibility for making the legal argument to keep out the transcript?

A Correct.

Q With you chiming in when you could?

A With me two inches away chiming in every chance I could.

Q Now, do you remember the DA relied specifically on a case, Commonwealth v. Christie?

A I don't. I don't. I don't remember him doing that. If he did, he did. I'm sure the record will show it, but I don't recall it.

Q Okay. Well, let me just tell you the DA did rely on a case called Commonwealth v. Christie which stands for the proposition that burglary is not inherently a violent crime. And the district attorney is entitled to bring forth proof that in this particular instance it was violent, the burglary was violent, and that was authority for getting this transcript in. Does that sound right to you?

A It may have. To be honest with you I know he was – he may have cited something, but I don't recall that being it. Maybe in the transcript that he cited that, but I

remember his arguing it, that he had the right to explore it and to get all of that in to show how violent it was. And if you say it's there I'll [228] take your word for it. He may have. I just don't recall if he used authority or cited that as authority. He may have.

Q If I were to tell you that your argument happened on November the 2nd – well, November 2nd, 1988?

A That's when it happened, sure.

Q That legal argument took place and the Court ruled that the Christie cite could come in. If I were to tell you that on October the 18th, 1988, approximately two or three weeks before that argument, the Pennsylvania Supreme Court decided a case called Commonwealth v. Roland which overruled Christie on point of burglary being violent.

A And said that they are inherently the crimes of violence?

Q Is violent?

A Yes.

Q Now, given you are familiar with Roland I take it?

A Yes.

Q And given the fact that Roland was decided some two to three weeks before this legal argument, if I were to tell you that neither you nor Ms. Dantos cited Roland, which overruled quite literally Christie [229] on this point, would it be fair to say that that was a mistake on your part, the defense team's part?

A If we failed to cite it, I think it was because we offered to stipulate to it. And I don't know that you could – you could. We offered to stipulate that it was a crime of violence. I think we even offered it. I do know it was on the record. It should be that, you know, that it was involving a rape, you know, of a crime of burglary to rape.

Q So your stipulation wasn't accepted, right?

A The stipulation – the Judge ruled that he could do it. And I don't think – I don't – I don't know that the Judge was going to change his mind on that even if we gave him that case. We give him cases, Attorney Wiseman, that showed him that he could not read the accomplice charge to the jury. And he read it anyway. So I don't know that – I don't know that that was a mistake. What that would have had in it was a mistake.

And I don't know if it was whether it would have any impact on this judge, because we went to a great length to show him the law that he could not read the accomplice charge to the jury, and he did. And then he did not read the culpability section, and we went to a great length and showed him that he had to [230] do this. So I don't know if that would have any impact on that. Whether it's a mistake, I don't know.

Q I'm not asking you to predict what the judge might have done. What I'm asking you is, you were two lawyers arguing legal point. Your opponent cited the case that was effectively gutted two weeks before by the same court. My question is, as a lawyer wouldn't you – wouldn't it have been appropriate and proper for you to have had that more recent authority that supported your position?

A And my – it might have been, sure, if we had it. If we had that authority or if we had an opportunity to present him with law in response, if he would have given us a chance to go down on that issue and even present to him some authority, he didn't give us the time on that issue to do anything. And that's why I didn't remember whatever Mr. Moyer said concerning the Christie case. I think it was somewhat of a spontaneous argument. And I'm not sure that had we had ten cases that he was going to give us a chance to go down and get it and show it to them.

And like we said, we had given him case law and authority. What he had been doing and he still did was in effect what the district attorney asked for.

[231] Q You knew well before the penalty phase that the DA was going to try to read transcripts?

A Yes.

Q And the letter you wrote to Mr. Rompilla says, look, if you go to the penalty phase they are going to read this transcript?

A That's correct.

Q So you knew ahead of time that this was going to be an issue?

A Correct.

Q Now, given that you knew ahead of time it was going to be an issue, it's really not Judge Mellenberg's fault that you didn't have the case with you?

MS. PARADIS: Objection. Objection. The Roland case –

Q You didn't go downstairs to get it? It's really not his fault that you didn't have it with you?

MS. PARADIS: Objection. The Roland case was decided after the letter to Mr. Rompilla.

MR. WISEMAN: That's not what I'm talking about, Judge. I'm talking about the argument of November 2nd.

THE COURT: All right, Objection [232] to the form of the question is sustained. We'll take this up tomorrow morning. We'll end now, and we'll take it up with that question at 9:15.

MR. WISEMAN: One housekeeping matter, Your Honor. We have scheduled a number of lay witnesses to appear in the morning. They are all working and taking time off from various things as I realize Mr. Charles is as well. We've already sort of lined them up for the morning.

Could we possibly ask Mr. Charles to come in in the afternoon? People have already gotten permission to get off of work and whatever their other obligations are going to create havoc with the schedule.

THE COURT: What's your schedule?

THE WITNESS: It's going to be a problem, Judge, for the afternoon. I have juggled everything today until tomorrow morning and everything in the morning to the afternoon.

THE COURT: We'll take Mr. Charles and get that done at 9:15. All right. We'll be in recess or adjournment until 9:15 tomorrow.

* * *

(Proceedings adjourned.)

[233] CERTIFICATION

I.

I hereby certify that the proceedings are contained fully and accurately in the notes taken by me of the above cause and that this is a correct transcript of the same.

DATE: 1-6, 1997

/s/ Moira E. Evans
Moira E. Evans, RPR
Official Court Reporter

II.

The foregoing record of the proceedings on the within trial is directed to be filed.

DATE: Jan. 6, 1997

/s/ Thomas A. Wallitsch
THOMAS A. WALLITSCH, J.